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Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 16-cv-951 (LAK)

-----x
DANIEL KLEEBERG, LISA STEIN and
AUDREY HAYS,

Plaintiffs,

-against-

LESTER EBER; ALEXBAY, LLC f/k/a LESTER
EBER, LLC; CANANDAIGUA NATIONAL
CORPORATION d/b/a CANANDAIGUA NATIONAL
BANK & TRUST; ELLIOT W. GUMAER, JR.;
EBER BROS. & CO., INC.; EBER BROS.
WINE AND LIQUOR CORPORATION; EBER
BROS. WINE AND LIQUOR METRO, INC.,
EBER-CONNECTICUT, LLC; and WENDY EBER,

Defendants.

-----x
January 24, 2019

Videotaped deposition of LESTER EBER

Page 2	Page 4
1	1
2 January 24, 2019	2 A P P E A R A N C E S: (Cont'd):
3 9:33 a.m.	3
4	4 JOHN HERBERT, ESQ. (Telephonically)
5	5 Attorneys for Defendants LESTER EBER and
6 Videotaped deposition of LESTER EBER,	6 WENDY EBER
7 held at the offices of Veritext New York City,	7 P.O. Box 1031
8 1250 Broadway, New York, New York, pursuant to	8 Tiburone, California 94920
9 Notice, before Lynne D. Metz, a Shorthand Reporter	9
10 and Notary Public of the State of New York.	10
11	11 CALIHAN LAW PLLC
12	12 Attorneys for Defendant Estate of ELLIOT W.
13	13 GUMAER
14	14 16 East Main Street
15	15 Rochester, New York 14614
16	16 BY: ROBERT B. CALIHAN, ESQ.
17	17
18	18
19	19 ALSO PRESENT:
20	20 Wayne Saline - Videographer
21	21 Dan Kleeberg
22	22
23	23
24	24
25	25
Page 3	
1	1
2 A P P E A R A N C E S:	2
3	3
4 BROOK & ASSOCIATES PLLC	4 IT IS HEREBY STIPULATED AND AGREED, by and
5 Attorneys for Plaintiffs	5 between the attorneys for the respective parties
6 100 Church Street	6 herein, that filing and sealing be and the same
7 8th Floor	7 are hereby waived.
8 New York, New York 10007	8 IT IS FURTHER STIPULATED AND AGREED
9 BY: BRIAN C. BROOK, ESQ.	9 that all objections, except as to the form of the
10	10 question, shall be reserved to the time
11	11 of the trial.
12 UNDERBERG & KESSLER LLP	12 IT IS FURTHER STIPULATED AND AGREED that the
13 Attorneys for Defendants LESTER EBER;	13 within deposition may be signed and sworn to
14 ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER	14 before any officer authorized to administer an
15 BROS. & CO., INC.; EBER BROS. WINE AND	15 oath, with the same force and effect as if signed
16 LIQUOR CORPORATION; EBER BROS. WINE AND	16 and sworn to before the officer before whom the
17 LIQUOR METRO, INC., EBER-CONNECTICUT, LLC;	17 within deposition was taken.
18 and WENDY EBER	18
19 50 Fountain Plaza	19
20 Buffalo, New York 14202	20
21 BY: COLIN D. RAMSEY, ESQ.	21
22	22
23 (Appearances continued on next page)	23
24	24
25	25

2 (Pages 2 - 5)

<p>1</p> <p>2 THE VIDEOGRAPHER: We are going on the</p> <p>3 record at 9:33 on January 24, 2019. Please</p> <p>4 note that the microphones are sensitive and</p> <p>5 may pick up whispering and private</p> <p>6 conversations. Please turn off all cell</p> <p>7 phones and place them away from the</p> <p>8 microphones as they may interfere with the</p> <p>9 deposition audio. Recording will continue</p> <p>10 until all parties agree to go off the</p> <p>11 record.</p> <p>12 This is media unit one of the video</p> <p>13 recorded deposition of Lester Eber taken by</p> <p>14 counsel for plaintiff in the matter of Dan</p> <p>15 Kleeberg et al versus Lester Eber et al</p> <p>16 filed in the United States District Court</p> <p>17 Southern District of New York, case number</p> <p>18 16-CV-9517 (LAK). This deposition is being</p> <p>19 held at Veritext located at 1250 Broadway</p> <p>20 New York, New York.</p> <p>21 My name is Wayne Saline from the firm</p> <p>22 Veritext. I am the videographer. The court</p> <p>23 reporter is Lynne Metz from the firm</p> <p>24 Veritext.</p> <p>25 At this time the attorneys will</p>	<p>Page 6</p> <p>1 L. Eber</p> <p>2 Q. Just because no matter how many times</p> <p>3 you do this it is worth going over it again. I</p> <p>4 will go over some of the differences between</p> <p>5 today's deposition and a typical conversation to</p> <p>6 make sure that we are as efficient and have as</p> <p>7 clean a record as possible.</p> <p>8 One major difference is there is a</p> <p>9 court reporter writing down everything that we</p> <p>10 say. So even though there is a videographer</p> <p>11 recording it too, it is important that we do our</p> <p>12 best not to talk over each other. Even if you</p> <p>13 know where I am going with the question, please</p> <p>14 let me finish the question before you answer it.</p> <p>15 Okay?</p> <p>16 MR. RAMSEY: Yes?</p> <p>17 A. Yes.</p> <p>18 Q. And that brings me to the next point.</p> <p>19 All responses need to be verbal meaning yes or no</p> <p>20 rather than shaking your head or grunts like aha.</p> <p>21 Okay?</p> <p>22 A. Yes.</p> <p>23 Q. Another thing is that if I ask a</p> <p>24 question and you answer it, I am going to assume</p> <p>25 that you understood the question. So if there is</p>
<p>1 L. Eber</p> <p>2 introduce themselves and their affiliations</p> <p>3 for the record. The court reporter will</p> <p>4 swear in the witness and we can proceed.</p> <p>5 MR. BROOK: On behalf of the</p> <p>6 plaintiffs Brian Brook of Brook and</p> <p>7 Associates PLLC.</p> <p>8 MR. RAMSEY: Colin Ramsey from</p> <p>9 Underberg and Kessler on behalf of the Eber</p> <p>10 defendants.</p> <p>11 MR. CALIHAN: Robert Calihan on behalf</p> <p>12 of the Estate of Elliot Gumaer.</p> <p>13 MR. KLEEBERG: Dan Kleeberg.</p> <p>14 L E S T E R E B E R,</p> <p>15 called as a witness, having been first duly</p> <p>16 sworn by the Notary Public (Lynne D. Metz),</p> <p>17 was examined and testified as follows:</p> <p>18 EXAMINATION BY</p> <p>19 MR. BROOK:</p> <p>20 Q. Good morning Mr. Eber.</p> <p>21 Have you been deposed before?</p> <p>22 A. Yes.</p> <p>23 Q. When is the last time you were</p> <p>24 deposed?</p> <p>25 A. A couple of years ago.</p>	<p>Page 7</p> <p>1 L. Eber</p> <p>2 something in my question that you don't understand</p> <p>3 be sure to ask me to clarify my question before</p> <p>4 you answer it.</p> <p>5 Okay?</p> <p>6 A. Yes.</p> <p>7 Q. How do you feel today?</p> <p>8 A. Okay.</p> <p>9 Q. Is there any reason such as being</p> <p>10 tired, overly stressed or on prescription</p> <p>11 medications or something like that that would</p> <p>12 impair your ability to testify fully and</p> <p>13 truthfully today?</p> <p>14 A. Not that I know of.</p> <p>15 Q. What is your date of birth?</p> <p>16 A. 1/26/38.</p> <p>17 Q. And what is your home address?</p> <p>18 A. 15 Coral Way, Rochester, New York.</p> <p>19 Q. When you were last deposed, what was</p> <p>20 the legal matter that was in connection with?</p> <p>21 A. It was part of being a lobbyist for</p> <p>22 Southern Glazer Wine and Liquor.</p> <p>23 Q. And how was that part of the being a</p> <p>24 lobbyist, sir?</p> <p>25 A. It was guarding legislation that had</p>

<p style="text-align: right;">Page 66</p> <p>1 L. Eber 2 Q. And then the next year you received a 3 W-2 from Eber Connecticut LLC; correct? 4 A. Yes. 5 Q. And in that year Eber Connecticut LLC 6 paid you wages, tips and other compensation 7 totalling 189,788 dollars; correct? 8 A. Yes. 9 Q. So not quite as much paid by Eber 10 Connecticut as you had made the year before from 11 Eber Brothers Wine and Liquor; correct? 12 A. That's correct. 13 Q. Just under two thirds of the amount; 14 correct? 15 A. Yes. 16 Q. Now the consulting agreement provided 17 for an annual sum for five years of six hundred 18 thousand dollars per year; correct? 19 A. Yes. 20 Q. So that was more than twice what you 21 were paid in terms of salary by Eber Brothers Wine 22 and Liquor Corp.? 23 A. Yes. 24 Q. How did that amount get determined in 25 the course of negotiations?</p>	<p style="text-align: right;">Page 68</p> <p>1 L. Eber 2 correct? Is that a yes? 3 A. Yes. 4 Q. In connection with the overall 5 transaction, Southern ended up giving what was, I 6 suppose some kind of a loan in the amount of three 7 million dollars to one of the Eber companies; is 8 that right? 9 A. Yes. I don't know if it was a loan. 10 It was money that the Eber companies owned, owed 11 Southern for the money they came up with to keep 12 us out of bankruptcy. 13 Q. So it wasn't a loan per se but one or 14 more of the Eber companies agreed that they owed 15 Southern three million dollars as a result of the 16 deal; correct? 17 A. Yes. As a result of moneys that were 18 paid to them to pay them back for the money they 19 advanced us to keep us out of bankruptcy. 20 Q. So how much money did Southern advance 21 to the Eber companies not counting your consulting 22 agreement? 23 A. I don't remember the figure. It was 24 substantial. 25 Q. Was it more than three million</p>
<p style="text-align: right;">Page 67</p> <p>1 L. Eber 2 A. They are a very large company. They 3 are 17 billion today. They do 2 billion in New 4 York. Two thousand employees. They pay big 5 salaries. 6 Q. So did you ask for this consulting 7 agreement? 8 A. They offered it to me. 9 Q. And did they ask for anything else in 10 return besides your governmental affairs services? 11 MR. RAMSEY: Form. 12 A. They gave me the freedom to set up a 13 lobbying governmental affairs structure in the 14 State of New York for them. 15 Q. Did they ask for anything else in 16 return for agreeing to this six hundred thousand 17 dollars a year for five years payment? 18 MR. RAMSEY: Form. 19 A. No. 20 MR. RAMSEY: Form objection to that 21 question. 22 Q. So Southern did not -- let's step 23 back. 24 So six hundred thousand a year for 25 five years, that's three million dollars total;</p>	<p style="text-align: right;">Page 69</p> <p>1 L. Eber 2 dollars? 3 A. Yes. 4 Q. So of the amount of money that was 5 advanced, Eber Brothers agreed to pay back three 6 million of it; correct? 7 MR. RAMSEY: Form. 8 A. They paid back all the money that was 9 advanced to them. 10 Q. So separate from advancements, did 11 Southern also make payments that were not subject 12 to repayment to Eber Brothers not counting 13 payments for inventory? 14 A. No. 15 Q. So is it just a coincidence then that 16 the amount of money that Eber Brothers was 17 required to pay Southern three million dollars is 18 the same amount that the consulting agreement 19 provided to be paid to you? 20 MR. RAMSEY: Form. 21 A. I never thought of it that way at all. 22 I never thought of that. 23 Q. Besides Patrick Dalton, was anyone 24 else involved in negotiating or reviewing your 25 consulting agreement with Southern?</p>

18 (Pages 66 - 69)

<p>1 L. Eber</p> <p>2 A. I don't remember.</p> <p>3 Q. Was Mike Gumaer involved in the</p> <p>4 consulting agreement with Southern?</p> <p>5 A. He would be aware of anything I was</p> <p>6 involved in. Everything I did he knew about.</p> <p>7 Q. Do you have any specific recollections</p> <p>8 of discussing the consulting agreement with Mike</p> <p>9 Gumaer?</p> <p>10 A. I don't remember, but there is nothing</p> <p>11 that I would have done that he would not be aware</p> <p>12 of.</p> <p>13 Q. And do you recall discussing the</p> <p>14 consulting agreement with any other employees of</p> <p>15 Eber Brothers?</p> <p>16 A. Possibly the financial officer John</p> <p>17 Ryan.</p> <p>18 Q. You say possibly.</p> <p>19 You don't specifically recall doing</p> <p>20 so?</p> <p>21 A. I can't remember.</p> <p>22 Q. And the consulting agreement was not</p> <p>23 specifically approved by the board of directors;</p> <p>24 correct?</p> <p>25 A. I don't know.</p>	<p>Page 70</p> <p>1 L. Eber</p> <p>2 letters that appears to be written on Lester</p> <p>3 Eber's letterhead bearing Bates stamps EB 695</p> <p>4 through 701.</p> <p>5 Do you see these letters?</p> <p>6 A. Yes.</p> <p>7 Q. Do these refresh your recollection</p> <p>8 that there was a subsequent agreement, subsequent</p> <p>9 agreements between you and Southern concerning</p> <p>10 consulting?</p> <p>11 A. I think you are a little confused on</p> <p>12 this.</p> <p>13 Q. Okay. Help me understand.</p> <p>14 A. This is an agreement. I am a</p> <p>15 registered lobbyist in the State of New York.</p> <p>16 JACO is the regulatory agency that supervises</p> <p>17 lobbyists and they pay me to be a lobbyist. I</p> <p>18 think it is ten thousand dollars a year and I</p> <p>19 happen to have an agreement in order to lobby with</p> <p>20 the governmental agencies and the Governor's</p> <p>21 Office in the State of New York and that's what</p> <p>22 this is.</p> <p>23 Q. So are you saying are there any other</p> <p>24 -- let's step back.</p> <p>25 So just looking at the first page of</p>
<p>1 L. Eber</p> <p>2 Q. In addition to providing governmental</p> <p>3 affairs services, Southern also required you to</p> <p>4 enter into a restrictive covenant; correct?</p> <p>5 A. Yes.</p> <p>6 Q. Why was that?</p> <p>7 A. It was what they wanted so that I</p> <p>8 wouldn't compete or someone else would hire me for</p> <p>9 doing governmental work. It is a specialty.</p> <p>10 Q. And after the initial five-year term,</p> <p>11 did you continue to have -- withdrawn.</p> <p>12 After the initial five-year term, were</p> <p>13 there subsequent agreements between you and</p> <p>14 Southern for consulting services?</p> <p>15 A. There is no agreement. I am a</p> <p>16 consultant for them.</p> <p>17 MR. BROOK: Let's go to the next</p> <p>18 Exhibit 29.</p> <p>19 (Plaintiffs' Exhibit 29, a series of</p> <p>20 letters that appears to be written on Lester</p> <p>21 Eber's letterhead bearing Bates stamps EB</p> <p>22 695 through 701, marked for identification,</p> <p>23 as of this date.)</p> <p>24 Q. I am showing you what has been marked</p> <p>25 as Plaintiffs' Exhibit 29. It is a series of</p>	<p>Page 71</p> <p>1 L. Eber</p> <p>2 this exhibit that's a letter dated January 1, 2012</p> <p>3 addressed to Steven Becker.</p> <p>4 Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Who is Steven Becker?</p> <p>7 A. He is principal in charge of</p> <p>8 governmental affairs for the United States for</p> <p>9 Southern Glazers.</p> <p>10 Q. And this letter, is this something you</p> <p>11 wrote up or the language was given to you by</p> <p>12 someone else?</p> <p>13 A. I don't remember, but it is what has</p> <p>14 to be done to give the JACO in New York. I have</p> <p>15 to be a registered lobbyist. It is required.</p> <p>16 Q. And is the contract between you and</p> <p>17 the company that you are lobbying for something</p> <p>18 that has to be disclosed to the government?</p> <p>19 A. Yes, the State of New York. It is</p> <p>20 disclosed to the State of New York, yes.</p> <p>21 Q. So when we were looking at the</p> <p>22 consulting agreement, Exhibit 27, is that a</p> <p>23 document that was disclosed to the State of New</p> <p>24 York?</p> <p>25 A. No.</p>

19 (Pages 70 - 73)

<p style="text-align: right;">Page 74</p> <p>1 L. Eber 2 Q. Why not? 3 A. It's not a lobbying agreement. This 4 is a governmental lobbying agreement that I have 5 to have as being a lobbyist, a registered 6 lobbyist. 7 Q. So -- 8 A. The other is a private agreement 9 between myself and Southern. 10 Q. So for the years 2007 through 2011, 11 was there a separate lobbying agreement between 12 you and Southern? 13 A. There should have been. 14 Q. Do you recall whether there was an 15 actual one? 16 A. I don't remember, but I don't know if 17 they required the agreements changed and I can't 18 remember everything, but I think with the JACO 19 regulations Southern told me that, you know, I 20 have to have a -- because of the time I am 21 spending in Albany with the legislature and the 22 State Liquor Authority or with the Governor's 23 Office that I have to register as a lobbyist and I 24 had not registered as a lobbyist before. 25 Q. So for the year 2012, the year covered</p>	<p style="text-align: right;">Page 76</p> <p>1 L. Eber 2 compensation. 3 What is your best estimate of what 4 your annual compensation from Southern has been in 5 total for any of the years from 2012 through the 6 present? 7 MR. RAMSEY: Form. 8 Go ahead. If you can give an 9 estimate, go ahead. 10 A. Yeah, I think it's twenty-five 11 thousand a month. 12 Q. Do you recall attending a settlement 13 conference in this case in early September last 14 year? 15 A. Yes, I believe so. 16 Q. Do you remember that at one point 17 everyone except for Mr. Gumaer's attorney was 18 sitting in the courtroom with the judge in a 19 circle and we were talking about certain fact 20 questions that the plaintiffs had? 21 A. I believe it went on. I don't 22 remember the questions. 23 Q. Do you recall that I brought up the 24 topic of your consulting agreement with Southern 25 at that point?</p>
<p style="text-align: right;">Page 75</p> <p>1 L. Eber 2 by page one of Exhibit 29, what was your total 3 compensation received from Southern Wine and 4 Spirits for all your activities on their behalf 5 lobbying, consulting or otherwise? 6 A. I don't remember. 7 Q. According to this document it says the 8 fee for your services covered by it was ten 9 thousand dollars? 10 A. Oh, for lobbying. Yes, for being a 11 registered lobbyist was 10,833 a month is what I 12 get from them. 13 Q. And were you paid other sums as well? 14 A. I was paid yes, as a consultant. Yes. 15 RQ MR. BROOK: We request that all 16 payment records between Mr. Eber and 17 Southern be produced including tax forms and 18 any other agreements that may exist that 19 show fees for consulting or other services 20 beyond the amount reflected on this Exhibit 21 29. 22 MR. RAMSEY: I understand your 23 request. 24 BY MR. BROOK: 25 Q. You said you don't remember the exact</p>	<p style="text-align: right;">Page 77</p> <p>1 L. Eber 2 A. I don't remember it. 3 Q. So you don't remember saying that that 4 consulting agreement and the payments relating to 5 it ended back in 2012? 6 MR. RAMSEY: Form. 7 A. Yes. I do remember the agreement 8 ended after five years, the consulting agreement. 9 Q. But is it your testimony that at least 10 half or approximately half of the payments 11 continued in the years afterwards? 12 MR. RAMSEY: Form. 13 A. Yes. 14 Q. It is your testimony that's not 15 pursuant to any kind of agreement between you and 16 Southern? 17 A. Yes. 18 Q. So how does the amount of money that 19 Southern pays you get determined? 20 A. It is what they feel my services are 21 worth. 22 Q. So what happens if Southern decides to 23 pay you nothing for your services? 24 A. I am through. 25 Q. Meaning you are not going to provide</p>

20 (Pages 74 - 77)

<p style="text-align: right;">Page 78</p> <p>1 L. Eber 2 services for Southern anymore? 3 A. I won't be involved with them, that's 4 correct, yes. 5 Q. Other than monthly payments of 6 approximately twenty-five thousand dollars per 7 month, are there any other benefits or perks that 8 you receive from Southern? 9 MR. RAMSEY: Form. 10 A. I don't get any fringe benefits from 11 them of any kind. I do get expenses, legitimate 12 business expenses. 13 Q. Do you have an expense credit card for 14 Southern? 15 A. No. 16 Q. So how do you submit your expenses to 17 Southern? 18 A. I submit them monthly. 19 Q. And are you still bound by any kind of 20 restrictive covenant with Southern? 21 MR. RAMSEY: Form. 22 A. I don't believe so. 23 Q. So you believe at this point if you 24 went and tried to start up the Eber Brothers Wine 25 and Liquor business in New York that would not be</p>	<p style="text-align: right;">Page 80</p> <p>1 L. Eber 2 manage the Eber assets? 3 MR. RAMSEY: Form. 4 A. For the beneficiaries of the trust. 5 Q. Who were the beneficiaries of the 6 trust? 7 A. Myself and my sisters. 8 Q. And after your sisters passed, who 9 were the other beneficiaries of the trust at that 10 point? 11 A. It was their children. 12 Q. And that is for your sister Nan. 13 What was her child's name? 14 A. Mildred was my sister. 15 Q. Sorry. I think I was using her middle 16 name. 17 What was Mildred's daughter's name? 18 A. Audrey. 19 Q. And your sister Sally, what were her 20 kid's names? 21 A. Danny and Lisa. 22 Q. After your sisters passed, did you 23 continue to understand you had an obligation to 24 manage the trust for the benefit of your nieces 25 and nephew?</p>
<p style="text-align: right;">Page 79</p> <p>1 L. Eber 2 something that would violate any agreement you 3 have with Southern? 4 MR. RAMSEY: Form. 5 A. I don't know about that. It's not 6 something I am going to do. 7 Q. I am going to change topics now. 8 How did you, if you know, how did it 9 come to pass that you were named a trustee of the 10 Allen Eber trust? 11 A. I do not know. 12 Q. Is this something that you had 13 discussed with your father before his passing? 14 A. No. 15 Q. What is your understanding of what 16 your responsibilities were as a named trustee of 17 the Allen Eber trust? 18 A. My responsibilities? 19 Q. Yes. 20 As a trustee, what did that mean that 21 you had to do? 22 MR. RAMSEY: Form. 23 A. With the -- work with the other 24 co-trustees in managing the Eber assets. 25 Q. And for whom's benefit did you have to</p>	<p style="text-align: right;">Page 81</p> <p>1 L. Eber 2 A. I didn't manage the trust. I worked 3 with the other two trustees. 4 Q. Who were the other two trustees? 5 A. Mike Gumaer and the bank. 6 Q. What was Mike Gumaer's involvement in 7 managing the trust? 8 A. He was a lawyer and he was put there 9 by my father to work and guide me in the 10 management of the business and to work with me in 11 the trust. 12 Q. Was Mike Gumaer a lawyer for the 13 trust? 14 MR. RAMSEY: Form. 15 A. No. He was a lawyer for Eber Brothers 16 but he was a trustee of the trust. 17 Q. What was the bank's responsibility 18 with respect to the trust? 19 A. They were there. They did a lot of 20 the paperwork and legal work of the operation of 21 the trust. 22 Q. You understood that the Eber Brothers 23 business was a trust asset; correct? 24 A. Yes. 25 Q. What did that mean in terms of how it</p>

<p style="text-align: right;">Page 82</p> <p>1 L. Eber 2 affected your management of the Eber Brothers 3 business? 4 MR. RAMSEY: Form. 5 MR. CALIHAN: Form. 6 A. I don't understand the question. 7 Q. Did the fact that the Eber Brothers 8 business was owned by the trust affect the way in 9 which you managed the Eber Brothers business at 10 all? 11 MR. RAMSEY: Form. 12 A. I reported to the trust. 13 Q. So since you were a co-trustee -- 14 withdrawn. 15 Putting aside who you reported to, did 16 you understand that you had an obligation to run 17 the Eber Brothers business for the benefit of the 18 trust beneficiaries? 19 MR. RAMSEY: Form. 20 A. Could you repeat that question? 21 Q. The Eber Brothers business, at the top 22 level there was Eber Brothers and Co., Inc.; 23 correct? 24 A. Yes. 25 Q. And is it correct that all of the</p>	<p style="text-align: right;">Page 84</p> <p>1 L. Eber 2 MR. RAMSEY: Form. 3 A. Yes, I believe so. 4 Q. So with respect to the company Eber 5 Brothers and Co., Inc., you understood you had a 6 fiduciary duty with respect to the trust, your 7 sisters and yourself? 8 MR. RAMSEY: Form. 9 Q. Correct? 10 A. Yes. 11 Q. And did you understand that when you 12 owe fiduciary duties to multiple individuals at 13 the same level like that that you are not allowed 14 to prefer one individual shareholder over another 15 individual shareholder? 16 MR. CALIHAN: Objection to form. 17 MR. RAMSEY: Form. 18 A. I never got into any of this. This is 19 something I just did my job with the company and 20 reported to the trustees of the trust. 21 Q. Was it your understanding that you 22 could issue dividends or distributions to some 23 shareholders but not others? 24 A. I don't understand the question. It's 25 is something I never -- I don't have an</p>
<p style="text-align: right;">Page 83</p> <p>1 L. Eber 2 shares of that business, at least all the voting 3 shares, were controlled by the Allen Eber trust? 4 A. Yes. 5 Q. And is it your understanding that it 6 is the voting common shareholders to whom a 7 corporate officer owes a primary duty of care? 8 MR. RAMSEY: Form. 9 A. I don't have an answer for you on 10 that. I don't know. 11 Q. Who are the other shareholders in Eber 12 Brothers and Co., Inc. besides the Allen Eber 13 Trust? 14 A. There was common non-voting stock was 15 owned by myself and my sisters. 16 Q. Did anyone else own Eber Brothers and 17 Co., Inc. stock? 18 A. No. 19 Q. Did you have any understanding as to 20 whether -- withdrawn. 21 So you did understand that as a 22 corporate officer and a director you had a 23 fiduciary duty towards the shareholders of the 24 company; correct? 25 MR. CALIHAN: Objection to form.</p>	<p style="text-align: right;">Page 85</p> <p>1 L. Eber 2 understanding of what you are asking. 3 Q. In terms of Eber Brothers and Co., 4 Inc., that held the stock of other Eber Brothers 5 entities; correct? 6 A. Yes. 7 Q. Which entities did it control? 8 A. Whatever ones that were there at the 9 time. 10 Q. So that included Eber Brothers Wine 11 and Liquor Corp.; correct? 12 A. Yes. 13 Q. Were there other businesses such as a 14 framing business? 15 A. No. 16 Q. Or -- 17 A. The produce business. 18 Q. Produce business. 19 What was that called? 20 A. Eber and Co. 21 Q. When did Eber and Co. stop operations? 22 A. Eber and Co. was a produce business. 23 Stopped quite a few years ago. I don't have the 24 date. 25 Q. Did you ever work for that produce</p>

22 (Pages 82 - 85)

<p style="text-align: right;">Page 86</p> <p>1 L. Eber 2 business? 3 A. Yes. 4 Q. When was that? 5 A. In high school and college. 6 Q. Was it still operating at the time 7 that you graduated from college? 8 A. Yes. 9 Q. Who managed that? 10 A. Audrey Hays' father. 11 Q. What was his name? 12 A. Darwin Boslov, B-O-S-L-O-V. 13 Q. So not likely a creationist? 14 A. What? 15 Q. Bad joke. 16 Returning to Eber Brothers Wine and 17 Liquor Corp., you were the president of that 18 entity; correct? 19 A. Eventually. 20 Q. And what was your position with 21 respect to Eber Brothers and Co., Inc. at the same 22 time you were president of Eber Brothers Wine and 23 Liquor Corp.? 24 A. I was president of that too. 25 Q. Besides Eber Brothers and Co., Inc.,</p>	<p style="text-align: right;">Page 88</p> <p>1 L. Eber 2 as president of Eber Brothers Wine and Liquor 3 Corp.; correct? 4 A. Yes. 5 Q. But you remained president of Eber 6 Brothers and Co., Inc.? 7 A. Yeah, it's possible. I don't 8 remember. There are a lot of companies. It can 9 get confusing. 10 Q. What is your current position with 11 Eber Brothers and Co., Inc.? 12 A. My current position with Eber Brothers 13 and Co.? I could be a director. I don't remember 14 what else. The company actually there are so many 15 of them it confuses me. I would have to look at 16 what it actually is. 17 Q. Other than yourself, do you recall 18 anyone else whoever served as president of Eber 19 Brothers and Co., Inc.? 20 A. It's possible there could be somebody 21 else. 22 Q. What is Wendy's position with Eber 23 Brothers and Co., Inc.? 24 A. She may be president of it. 25 Q. When is the last time there was any</p>
<p style="text-align: right;">Page 87</p> <p>1 L. Eber 2 were there any other shareholders in Eber Brothers 3 Wine and Liquor Corp. when you were president of 4 it? 5 A. Not that I remember. 6 Q. So as president of Eber Brothers Wine 7 and Liquor Corp. you understood that your 8 fiduciary duties to the shareholders ran to 9 ultimately the Allen Eber Trust; correct? 10 MR. RAMSEY: Form. 11 A. I reported to the Allen Eber Trust. 12 Q. And Eber Brothers Wine and Liquor 13 Corp. in turn opened all of the shares in Eber 14 Brothers Wine and Liquor Metro Inc. once that was 15 created in the nineties; correct? 16 A. I don't remember. It's possible, but 17 I don't remember. 18 Q. Are there any Eber Brothers entities 19 that were owned or at one point controlled by Eber 20 Brothers and Co., Inc., where you did not believe 21 that you had fiduciary duties to the beneficiaries 22 of the trust? 23 MR. RAMSEY: Form. 24 A. No. 25 Q. At some point you ended up resigning</p>	<p style="text-align: right;">Page 89</p> <p>1 L. Eber 2 kind of election of either officers or directors 3 for Eber Brothers and Co., Inc.? 4 A. I don't remember. 5 Q. Why did you resign as president of 6 Eber Brothers Wine and Liquor Corp.? 7 A. Because it didn't see -- it didn't -- 8 there was nothing for me to do in Eber Wine and 9 Liquor Corp. anymore. I was working for Southern 10 in New York and then I was involved in Eber 11 Connecticut. 12 Q. Did someone replace you as president 13 of Eber Brothers Wine and Liquor Corp.? 14 A. I believe so. 15 Q. Who was that? 16 A. It could be Wendy Eber. I don't 17 remember. 18 Q. Well, if there was nothing for you to 19 do, was there something for Wendy Eber to do? 20 A. Yes. 21 MR. RAMSEY: Form. 22 Q. What was that? 23 A. She has a very strong financial 24 background and there were a lot of problems there 25 and she was very capable in relating to solving</p>

23 (Pages 86 - 89)

<p style="text-align: right;">Page 90</p> <p>1 L. Eber 2 those problems and dealing with regulatory 3 agencies and moneys that were owed and different 4 things that were thrown against the company. 5 Q. Which regulatory agencies are you 6 referring to? 7 A. Anyone that would -- any financial 8 ones that would be involved in any business. No 9 one in particular but there are different agencies 10 that any business confronts with. 11 Q. So there was no particular regulatory 12 agency or governmental or quasi governmental body 13 that you were specifically referring to when you 14 said that Wendy would need to interact with them 15 as president of the Eber Brothers Wine and Liquor 16 Corp.? 17 A. Well, you know the problems the 18 company had with the past Pension Benefit 19 Guarantee Corporation. 20 Q. So that's one. 21 A. And whatever other ones in different 22 situations that the company was faced with. 23 Q. What was the situation with Pension 24 Benefit Guarantee Corp.? 25 A. That Eber Brothers had a defined</p>	<p style="text-align: right;">Page 92</p> <p>1 L. Eber 2 that PBGC would be placing a lien on corporate 3 assets? 4 A. No. 5 Q. So as of 2012, did you expect that 6 Eber Brothers would be able to continue making the 7 payments due to PBGC? 8 A. The money wasn't there. You know we 9 tried to resolve it. It was a legacy that doesn't 10 go away. If you know the ERISA laws there is no 11 way out of it. 12 Q. Did you try to find a way out of it? 13 A. Yes. 14 Q. What was that? 15 A. Hired legal counsels that specialize 16 in it who I paid personally. 17 Q. Which counsel is that? 18 A. Groom in Washington, D.C. 19 Q. Anyone else? 20 A. With the PBGC you are talking about? 21 Q. Yes, to help get out of the ERISA laws 22 as you said. 23 A. We hired a law firm. They have a 24 branch in Rochester. Hourihan, he was the lawyer 25 on it.</p>
<p style="text-align: right;">Page 91</p> <p>1 L. Eber 2 benefit pension plan going back to 1950s and after 3 they couldn't afford to make the payments and so 4 the Pension Benefit Guarantee Corporation put the 5 company in default under the ERISA laws and we had 6 a deal with it. 7 Q. When was the default that you just 8 referred to? 9 A. I don't have the exact -- I don't 10 remember the exact date. 11 Q. By default do you mean place the lien 12 against the corporate assets? 13 A. Yes. 14 Q. Yes? 15 A. Yes. 16 Q. When did that occur? 17 A. I don't remember the exact date. 18 Q. Was it in approximately 2014? 19 A. It could have been. If you have it 20 there. I can't remember these dates. I am glad I 21 remember what I did yesterday. 22 Q. So your resignation was in 2012 to the 23 best of your recollection; correct? 24 A. Yes. 25 Q. So as of 2012 were you anticipating</p>	<p style="text-align: right;">Page 93</p> <p>1 L. Eber 2 Q. Is this the Bond -- 3 A. Bond Schoeneck, thank you. 4 Q. Any other lawyers that you hired? 5 A. I don't remember. It's possible, but 6 I don't remember. 7 Q. Do you recognize the name Glenn Sturm? 8 A. Yes. 9 Q. Who is he? 10 A. A lawyer. 11 Q. Is he a lawyer who you hired? 12 A. No. 13 Q. Who hired Glenn Sturm? 14 A. Well, I met him and he was hired, he 15 was hired. I would say I was involved in hiring 16 him. I correct that, and my daughter Wendy. 17 Q. And for what purpose was he hired? 18 A. To help Eber Connecticutt out of dire 19 financial straits. 20 Q. How specifically was Glenn Sturm 21 qualified to do that? 22 A. He was a partner, senior partner of 23 Mullins something in Atlanta. Very well 24 respected. Had done a lot in turnaround companies 25 and was going to -- did help us in navigating</p>

24 (Pages 90 - 93)

<p style="text-align: right;">Page 94</p> <p>1 L. Eber 2 through a very difficult financial period. 3 Q. How were you introduced to Glenn 4 Sturm? 5 A. I met him in a restaurant. 6 Q. Where was that? 7 A. In New Haven. 8 Q. When was that? 9 A. I don't have the date. 10 Q. Was it years before you had hired him 11 or shortly beforehand? 12 A. Shortly before we hired him. 13 Q. And what kinds of things did Glenn 14 Sturm advise you about in terms of the subject 15 matter? 16 A. Tried to get us bank loans. Brought 17 in consultants to help streamline the company. 18 Talk to our management. Education. Had an 19 excellent legal background and everything. 20 Q. Did he advise you or the companies 21 concerning their debts and trying to get out of 22 some of the debts that were owed to other third 23 parties like PBGC? 24 MR. RAMSEY: Form. 25 A. He did advise us on debt and how to</p>	<p style="text-align: right;">Page 96</p> <p>1 L. Eber 2 Mullins; is that right? 3 A. I believe so. I can't remember the 4 exact but he was working on his own at some point. 5 Q. And once he was working on his own, 6 how was the topic of selling him a piece of the 7 company broached? 8 A. I don't know. I don't remember. I 9 was not involved in that. 10 Q. Who was? 11 A. I would say my daughter Wendy. 12 MR. RAMSEY: When you get to a good 13 place Brian to take five minutes. 14 MR. BROOK: We can do that, sure. 15 THE VIDEOGRAPHER: This marks the end 16 of media unit two in the videotaped 17 deposition of Lester Eber. We are going off 18 the record. Time is 11:32. 19 (Recess taken.) 20 THE VIDEOGRAPHER: This marks the 21 beginning of media unit number three in the 22 videotaped deposition of Lester Eber. We 23 are going on the record. The time is 11:45. 24 BY MR. BROOK: 25 Q. Mr. Eber, when did you decide to cut</p>
<p style="text-align: right;">Page 95</p> <p>1 L. Eber 2 restructure the company to make it look more 3 attractive to banks so we could borrow money. 4 Q. And what were some of the ways in 5 which the company was restructured? 6 A. I don't actually remember the actual 7 restructuring. 8 Q. Was part of the restructuring included 9 in the sale of six percent of Eber Connecticut to 10 Polebridge Bowman? 11 A. I think the six percent to him was 12 that he wanted to get paid. And it was a way to 13 pay him and the company didn't have any money to 14 pay him. 15 Q. He was associated as a partner with a 16 law firm Nelson Mullins; correct? 17 A. Yes. 18 Q. Wasn't he paid through payments to his 19 law firm? 20 A. There were payments to his law firm 21 originally and then he -- I don't know what 22 happened between he and his law firm. He went 23 more on and off on his own. 24 Q. So it was your understanding that 25 while he was doing work for you he left Nelson</p>	<p style="text-align: right;">Page 97</p> <p>1 L. Eber 2 your sister, nieces and nephew out of the family 3 business? 4 MR. RAMSEY: Form. 5 A. I didn't. 6 Q. What do you mean by that? 7 A. I didn't decide to cut anyone out of 8 the family business. 9 Q. Didn't you take actions that cut your 10 sister, nieces and nephew out of the family 11 business? 12 MR. RAMSEY: Form. 13 A. I didn't look at it that way. I did 14 what would save a company from going into 15 liquidation. 16 Q. How did and -- withdrawn. 17 What did you do to save the company 18 from going into liquidation that you were just 19 referring to? 20 A. I have personally paid legal and other 21 expenses that I was not personally liable for to 22 keep the company viable that were legacy costs 23 that were shoved -- that were Eber Connecticut was 24 obligated to. You have a list of all of them. 25 Q. How did those cash infusions give you</p>

25 (Pages 94 - 97)

<p style="text-align: right;">Page 98</p> <p>1 L. Eber 2 the right to take control of the business for 3 yourself? 4 MR. RAMSEY: Form. 5 A. That wasn't -- the cash infusions kept 6 the company alive. If I didn't do that there 7 wouldn't be a company to talk about today. 8 Q. But you never at the time when you 9 agreed to make the cash infusions, you never said 10 if I do this I get to own the company, do I? 11 A. I never -- I just did what had to be 12 done to keep the company alive and if I hadn't had 13 done it there wouldn't be a company today. 14 Q. Is it your understanding that when 15 someone loans money to a company that person has 16 the right to take over the company in the event of 17 nonpayment? 18 MR. RAMSEY: Form. 19 A. All I know is if you loan money you 20 got to secure the loan so you can get your money 21 back. 22 Q. And is that what you did when you 23 loaned money to Eber Brothers? 24 A. I eventually did that. 25 Q. So when you say you know when you owe</p>	<p style="text-align: right;">Page 100</p> <p>1 L. Eber 2 A. It's a amended and restated promissory 3 note from the company. 4 Q. So this is Eber Brothers Wine and 5 Liquor Corp. promising to pay you; correct? 6 A. Yes. 7 Q. And who authorized this promissory 8 note on behalf of Eber Brothers Wine and Liquor 9 Corp.? 10 A. I would imagine it is John Ryan, chief 11 financial officer. 12 Q. And you also signed on behalf of Eber 13 Brothers Wine and Liquor Corp.? 14 A. Yes. 15 Q. And you also signed this document on 16 behalf of yourself? 17 A. Yes. 18 Q. Now on the first page, do you see 19 there is some handwritten amendments? 20 A. Yes. 21 Q. And the handwritten amendments 22 increased the interest rate from six percent to 23 nine percent? 24 A. Yes. 25 Q. And it looks like are those your</p>
<p style="text-align: right;">Page 99</p> <p>1 L. Eber 2 money you have to secure the loan, at what point 3 did you come to know that? 4 A. It was always something that as a 5 businessman that if you are lending money you got 6 to handle the companies in desperate situations 7 facing liquidation, you have to protect your, the 8 money you have lent. 9 Q. When did you secure any of your loans 10 with Eber Brothers? 11 A. I don't remember the exact dates. 12 MR. BROOK: Let's mark this as 13 Plaintiffs' Exhibit 30. 14 (Plaintiffs' Exhibit 30, a document 15 entitled Amended and Restated Promissory 16 Note bearing Bates numbers EB 00031310 17 through 311, marked for identification, as 18 of this date.) 19 Q. I am showing you what has been marked 20 as Plaintiffs' Exhibit 30. It is a document 21 entitled Amended and Restated Promissory Note 22 bearing Bates numbers EB 00031310 through 311. 23 Do you recognize this document? 24 A. Yes. 25 Q. What is it?</p>	<p style="text-align: right;">Page 101</p> <p>1 L. Eber 2 initials by that? 3 A. Yes. 4 Q. But John Ryan's initials don't appear 5 next to those changes, do they? 6 A. I didn't see them. 7 Q. Did John Ryan approve those changes? 8 A. I would imagine he had to approve them 9 and it is very possible there was a lawyer 10 involved in this. Would probably be Pat Dalton 11 that suggested this. 12 Q. Do you actually remember John Ryan 13 approving increasing the interest rate by 50 14 percent? 15 A. No. 16 Q. When did the change to the interest 17 rate occur? 18 A. I don't remember. 19 Q. This note, which is dated March 13, 20 2006, that is not a secured promissory note; 21 correct? 22 A. If that's what you say it is. I 23 haven't had a chance to read it. 24 Q. Do you have any recollection of 25 securing your 2006 promissory note?</p>

<p style="text-align: right;">Page 102</p> <p>1 L. Eber 2 A. No. 3 Q. Let's go to Exhibit 13 which we used 4 yesterday. That is a line of credit note with a 5 date in the upper right-hand corner of October 6 blank 2009. 7 Do you see that? 8 A. Yes. 9 Q. And this is a note that was issued by 10 Eber Brothers Wine and Liquor Metro Inc.; correct? 11 A. Yes. 12 Q. If you look on page 3 you see it was 13 authorized again by you and also Wendy Eber on 14 behalf of Eber Metro? 15 A. Yes. 16 Q. Was this note something that was 17 secured at the time that you executed it? 18 A. I haven't had a chance to read this. 19 I don't know. It probably wasn't. 20 Q. And as you sit here today, do you have 21 any recollection of insisting that you would not 22 loan more money to the company unless you got a 23 security agreement? 24 A. No, I don't remember saying that. I 25 did whatever I had to to keep the company alive.</p>	<p style="text-align: right;">Page 104</p> <p>1 L. Eber 2 Q. So why did the Eber companies sign the 3 security agreement? 4 MR. RAMSEY: Form. 5 A. The companies were in desperate 6 condition and could have been liquidated and it is 7 normal to ask for security in those circumstances. 8 Q. Are you saying it is normal to ask for 9 security for a loan after the loan has already 10 been executed? 11 MR. RAMSEY: Form. 12 A. As I told you before, I did whatever I 13 had to to keep the companies alive and not be 14 liquidated. There isn't a time to say is it 15 secured or not. You got to do it to keep the 16 company working, being able to run a business or 17 there wouldn't be a company. 18 Q. Who drafted the security agreement? 19 A. I don't remember. 20 Q. Was legal counsel retained for either 21 side of this transaction? 22 A. Very -- yeah. I would say yes. 23 Q. Who was legal counsel? 24 A. It would probably have been Pat 25 Dalton.</p>
<p style="text-align: right;">Page 103</p> <p>1 L. Eber 2 Q. So now let's take a look at Exhibit 3 15. This is the security agreement entered into 4 as of February 26, 2010. 5 Do you see that? 6 A. Yes. 7 Q. Do you remember this agreement? 8 A. Yes. I don't remember the details of 9 it but I do remember the agreement. 10 Q. Why did you enter into the security 11 agreement with Eber Brothers Metro and Eber 12 Brothers Wine and Liquor Corp.? 13 A. To protect my loans. 14 Q. What did the Eber companies get out of 15 this? 16 MR. RAMSEY: Form. 17 A. What did the Eber companies get out of 18 it? They were kept alive by my loans. 19 Q. But you already agreed to make loans, 20 hadn't you? 21 A. Yes, I had. Yes. 22 Q. And you made those loans without 23 requiring security; correct? 24 A. That's correct. 25 MR. RAMSEY: Form.</p>	<p style="text-align: right;">Page 105</p> <p>1 L. Eber 2 Q. Do you specifically remember Pat 3 Dalton working on this? 4 A. I can't remember, but that's who it 5 probably would have been. 6 Q. Do you remember when the billing 7 dispute between Eber Brothers and Pat Dalton 8 began? 9 A. Not the exact date of it. 10 Q. Was it in approximately 2009 or '10? 11 A. I don't think it was then. I can't 12 remember. I don't remember the dates. 13 Q. Did Glenn Sturm draft this agreement? 14 A. He could have. 15 Q. Let's look at one more document that 16 we covered yesterday. Here we go. Exhibit 16 17 this is another copy of the line of credit note 18 but you may remember this from yesterday's 19 testimony. On the upper right-hand corner it says 20 the date is February 26, 2010. 21 Do you see that? 22 A. Yes. 23 Q. Do you remember this version of the 24 line of credit note? 25 A. This one my signature is on it but I</p>

27 (Pages 102 - 105)

<p style="text-align: right;">Page 106</p> <p>1 L. Eber 2 don't remember it. 3 Q. So you don't remember why you signed 4 the same line of credit note with two different 5 dates? 6 A. No. 7 Q. When did -- let's look at either one 8 of the line of credit notes either Exhibit 13 or 9 16. Take your pick. I think the terms are all 10 the same except for the date. 11 MR. RAMSEY: Do you have 16 in front 12 of you? Look at this (indicating). 13 Q. Do you see at the bottom of paragraph 14 3 it says in the final sentence that "The maturity 15 date is defined as December 31, 2011."? 16 A. Yes. 17 Q. What is your understanding of what the 18 maturity date means with respect to a line of 19 credit note? 20 A. That it has to be paid then. 21 Q. And how was the maturity date for this 22 line of credit note determined? 23 A. I do not know. 24 Q. Did you think that it was realistic as 25 of February 2010 to expect Eber Metro or Eber</p>	<p style="text-align: right;">Page 108</p> <p>1 L. Eber 2 your bank account. 3 Q. At the time of approximately 2010 4 through 2012, was Eber Brothers Wine and Liquor 5 Corp. a solvent company? 6 A. Wine and Liquor, I don't know what -- 7 I don't think they were solvent. I think they 8 were struggling. 9 Q. Did you have any understanding of what 10 additional fiduciary duties a corporate executive 11 has at a time period when a company is in the zone 12 of insolvency? 13 MR. RAMSEY: Form. 14 A. I reported to the trust. They were 15 aware of everything that went on. I did the best 16 I could to keep above water. 17 Q. Why did you create the company 18 Alexbay? 19 A. It was at the suggestion of my 20 lawyers. 21 Q. Which lawyers? 22 A. Would have been David Beltz and there 23 is another one. I cannot think of the other. 24 Q. Who is David Beltz? 25 A. He was a lawyer that advised me in</p>
<p style="text-align: right;">Page 107</p> <p>1 L. Eber 2 Brothers and Co., Inc. to be able to pay 1.5 3 million dollars plus interest within less than two 4 years? 5 MR. RAMSEY: Form. 6 A. I did not draft this. I was involved 7 in keeping the company in business. That was my 8 priority. I was not involved in drafting this. 9 Q. How does taking Eber Brothers Metro 10 shares away from Eber Brothers Wine and Liquor 11 Corp. and putting it into your own company an 12 action that helps keep the company in business? 13 MR. RAMSEY: Form. 14 A. It restructures the company, cleans up 15 the statement and turns a debt into an asset for a 16 bank. So you can go -- because the company 17 couldn't get a loan. It couldn't get any loans 18 from anyone. So this cleans up the balance sheet 19 and makes it as an asset instead of a debt. 20 Q. So you wanted to transfer the company 21 out from underneath the debts owed by Eber 22 Brothers Wine and Liquor Corp.; correct? 23 A. I wanted to get a bank loan for the 24 company. You know in our business you have to pay 25 the suppliers. They transfer the money out of</p>	<p style="text-align: right;">Page 109</p> <p>1 L. Eber 2 Connecticut. 3 Q. And why did he say that you should 4 create the Alexbay company? 5 MR. RAMSEY: Hold on. Just be careful 6 you are not infringing on any conversation 7 you had. The action he ultimately took you 8 can testify about that. I don't want you 9 testifying to any conversations you had with 10 Mr. Beltz. 11 Q. What was the purpose -- I understand 12 that you created the company because a lawyer told 13 you to do it, but what was the purpose you 14 intended to have the company Alexbay serve? 15 A. A personal holding company. 16 Q. What did you want to hold when you 17 created it? 18 A. Whatever that had to be, that was, an 19 investment that I would make. 20 Q. Were you thinking of any specific 21 investments at the time you created it? 22 A. You know, I at the time I don't 23 remember what but it was a personal LLC that I 24 created that was created for me. 25 Q. Do you remember when you created it?</p>

<p>1 L. Eber</p> <p>2 A. I don't remember the date.</p> <p>3 Q. Let's mark this next exhibit</p> <p>4 Plaintiffs' Exhibit 31.</p> <p>5 (Plaintiffs' Exhibit 31, a copy of</p> <p>6 two printouts made on October 1, 2016 from</p> <p>7 the Connecticut Department of State</p> <p>8 concerning the business Alexbay LLC, marked</p> <p>9 for identification, as of this date.)</p> <p>10 Q. Plaintiffs' Exhibit 31 in front of you</p> <p>11 is a copy of two printouts made on October 1, 2016</p> <p>12 from the Connecticut Department of State</p> <p>13 concerning the business Alexbay LLC.</p> <p>14 Do you see it on the first page it</p> <p>15 states the date of incorporation/registration as</p> <p>16 December 8, 2011? It is the fifth line down.</p> <p>17 A. Yes.</p> <p>18 Q. And is that consistent with your</p> <p>19 recollection of when you created the company?</p> <p>20 A. I would believe so.</p> <p>21 Q. What was the original name that you</p> <p>22 had for your company?</p> <p>23 A. Lester Eber LLC.</p> <p>24 Q. Why did you change the name?</p> <p>25 A. There were enough Eber -- a lot of</p>	<p>Page 110</p> <p>1 L. Eber</p> <p>2 A. Eber Connecticut, yes.</p> <p>3 Q. And here is a document previously</p> <p>4 marked Exhibit Plaintiffs' 8.</p> <p>5 A. Yes.</p> <p>6 Q. This is an affidavit that was signed</p> <p>7 by you under oath on December 8, 2011; correct?</p> <p>8 A. Yes.</p> <p>9 Q. What was the purpose of this</p> <p>10 affidavit?</p> <p>11 A. It's a law that any transfer of stock</p> <p>12 or change in ownership of stock has to be reported</p> <p>13 to the Consumer Protection Agency in Connecticut.</p> <p>14 Q. So as of December 8, 2011 you had</p> <p>15 already decided to take Eber Connecticut and put</p> <p>16 it in Alexbay in some way; correct?</p> <p>17 MR. RAMSEY: Form.</p> <p>18 A. I don't remember the date.</p> <p>19 Q. This affidavit is dated December 8th;</p> <p>20 correct?</p> <p>21 A. Yeah.</p> <p>22 Q. And this states item number 4 or let's</p> <p>23 start with item number 3. 3 says "Presently 79</p> <p>24 percent of Eber Connecticut is owned by me through</p> <p>25 an entity known as Eber Metro.</p>
<p>1 L. Eber</p> <p>2 Ebers. Just too much confusion. I think it</p> <p>3 needed a separate name.</p> <p>4 Q. How did you arrive at the Alexbay LLC</p> <p>5 name?</p> <p>6 A. There were other names that I tried</p> <p>7 but they were taken in the state of Connecticut</p> <p>8 and I go up there in the summertime and I didn't</p> <p>9 think anyone would probably use that name.</p> <p>10 Alexandria Bay is in upstate New York on the</p> <p>11 Canadian border.</p> <p>12 Q. It is named after Alexandria Bay?</p> <p>13 A. Yes.</p> <p>14 Q. Is that a place that you visited?</p> <p>15 A. In the summer, yes.</p> <p>16 Q. So is it -- having seen the date when</p> <p>17 Alexbay which was then called Lester Eber LLC was</p> <p>18 created, does that refresh your recollection as to</p> <p>19 what particular investments or other holdings you</p> <p>20 wanted to have held by the company?</p> <p>21 MR. RAMSEY: Form.</p> <p>22 A. Yeah. I think it would be for the</p> <p>23 investment. Would be the investment in</p> <p>24 Connecticut.</p> <p>25 Q. You mean Eber Connecticut?</p>	<p>Page 111</p> <p>1 L. Eber</p> <p>2 4, I wish to transfer all of that 79</p> <p>3 percent that I own from Eber Metro to Lester Eber</p> <p>4 LLC, an entity which will also be wholly owned by</p> <p>5 me.</p> <p>6 5, this transfer is being done for no</p> <p>7 consideration and that it is being done strictly</p> <p>8 for organizational purposes. No money or other</p> <p>9 consideration will change hands."</p> <p>10 Did I read that correctly?</p> <p>11 A. Yes.</p> <p>12 Q. As of December 8, 2011 you had decided</p> <p>13 to take Eber Connecticut and have it be held by</p> <p>14 Lester Eber LLC; correct?</p> <p>15 MR. RAMSEY: Form.</p> <p>16 A. Yes.</p> <p>17 Q. Had any of the debt to you been</p> <p>18 defaulted on at that point?</p> <p>19 A. Hadn't been defaulted. Hadn't been</p> <p>20 paid either. There was no way of it being paid.</p> <p>21 Q. So you were still president of Eber</p> <p>22 Wine and Liquor and Eber Metro at that point;</p> <p>23 correct?</p> <p>24 A. Eber Metro but I don't know about Eber</p> <p>25 Wine and Liquor.</p>

29 (Pages 110 - 113)

<p style="text-align: right;">Page 114</p> <p>1 L. Eber 2 Q. Eber Metro had assumed all the debt to 3 you; correct? 4 A. Yes. 5 Q. And so as president of Eber Metro 6 weren't you obligated to try or -- withdrawn. 7 Was it your understanding that as 8 president of Eber Metro you had an obligation to 9 attempt to either pay outstanding debts that were 10 coming due or to renegotiate the terms of those 11 debts to avoid default? 12 MR. RAMSEY: Form. 13 A. I don't understand the question. You 14 got me confused. 15 Q. As the president of a company, do you 16 want to see that company be liquidated? 17 MR. RAMSEY: Form. 18 A. I did everything possible to stop a 19 liquidation. 20 Q. And isn't the liquidation something 21 that is often times a result of a default on a 22 large amount of debt? 23 A. Yes. 24 Q. And as a secured lender at that point 25 of Eber Metro, you had the right to require a</p>	<p style="text-align: right;">Page 116</p> <p>1 L. Eber 2 A. I had asked my sister and my niece to 3 contribute money and they both declined. 4 Q. When did you ask them to contribute 5 money? 6 A. I don't have the exact date, but I 7 did. There are letters that we submitted that 8 prove it. 9 Q. Does the timing of April 2010 sound 10 correct for when he sent those letters? 11 A. You probably have them here. So 12 that's what it is. I don't remember that date. 13 2010, can you remember? 14 Q. Unfortunately yes, but -- 15 A. Good. 16 Q. -- it is -- do you have any 17 recollection of after those letters were sent to 18 your sister and your niece ever raising the topic 19 again with them about putting money into the 20 Connecticut business? 21 A. Yes. 22 Q. When was that? 23 A. I don't remember the date but I will 24 let you know what my sister said. She said I want 25 to get money out. I don't want to put money in.</p>
<p style="text-align: right;">Page 115</p> <p>1 L. Eber 2 liquidation of the company if it went into 3 default; correct? 4 A. That's what it says. I don't know 5 what -- I don't know the law of what you are 6 talking about. So the only thing I knew was that 7 I had to keep -- I had invested a lot of money. I 8 continue to invest money and if I hadn't invested 9 money there would have been no Eber Connecticut 10 and what I did here was to clean up the statement 11 to make it look taking debt and making it into 12 assets so a bank would want to give us a loan. 13 When Wells Fargo left us we were nowhere's. We 14 had nothing. They put a workout team in our 15 company and we were desperate and I personally 16 lent enough money to keep this company, the last 17 vestige afloat and paid legal fees and everything 18 personally to do it. You got all those copies. 19 MR. RAMSEY: You answered the 20 question. 21 Q. Why didn't you create an entity that 22 rather than being held entirely by you was held by 23 the Allen Eber Trust and transfer the company into 24 that new entity? 25 MR. RAMSEY: Form.</p>	<p style="text-align: right;">Page 117</p> <p>1 L. Eber 2 Q. And when did she say that? 3 A. I don't remember the date. 4 Q. Was it around the time when you sent 5 her the letter? 6 A. It could have been and then later on. 7 I don't have the dates. 8 Q. Did you ever tell your sister that if 9 she didn't put money in that you were going to 10 take it away from the trust? 11 MR. RAMSEY: Form. 12 A. No, I didn't say that to her. 13 Q. Why not? 14 A. Because it wasn't that desperate a 15 situation. I did it when the company, it became 16 desperate that if I didn't put the money in no one 17 else was going to put it in and there wouldn't be 18 a company. 19 Q. How do you know if no one else was 20 going to put money in if they knew what was at 21 stake was the continuation of the family business 22 under the family trust? 23 MR. RAMSEY: Form. 24 A. They both refused and had no interest 25 in putting any money into the company.</p>

<p style="text-align: right;">Page 118</p> <p>1 L. Eber 2 Q. But you never told them of the 3 possibility that if they did not put money in they 4 would lose their interest in the family business; 5 correct? 6 MR. RAMSEY: Form. Asked and 7 answered. 8 Go ahead. You can answer it again. 9 MR. BROOK: It was asked but not 10 answered. 11 A. I don't remember saying that to them. 12 Q. Do you know anyone else who talked 13 with your sister or your niece about the need to 14 put money into the family business in 2010 or 15 2011? 16 A. I don't know. 17 Q. Looking at Exhibit 8 in front of you, 18 you signed that based upon your own knowledge and 19 belief it says at the top; right? 20 A. Yes. 21 Q. So and this was also something where 22 you made the statement or made the affidavit under 23 penalty of false statement; correct? 24 A. Yes. 25 Q. So you understood that it was a</p>	<p style="text-align: right;">Page 120</p> <p>1 L. Eber 2 is that you wish to transfer that 79 percent from 3 Eber Metro to Lester Eber LLC. 4 Do you see that? 5 A. Yes. 6 Q. So isn't it true that actually this 7 affidavit was written at a time when Eber 8 Connecticut was still ultimately or 79 percent of 9 Eber Connecticut was owned by the trust? 10 MR. RAMSEY: Form. 11 A. I don't understand what you -- I just 12 don't understand what you are saying here. 13 Q. You agree with me that if Eber Metro 14 was still an entity that was owned and controlled 15 by the trust, then the statement in item number 16 three would not be correct? 17 MR. RAMSEY: Form. 18 A. Could you repeat that? 19 (Record read.) 20 A. That's correct. 21 Q. Now item number 4 emphasizes that by 22 saying that Lester Eber LLC is an entity which 23 will also be wholly owned by me. 24 Do you see that? 25 A. Yes.</p>
<p style="text-align: right;">Page 119</p> <p>1 L. Eber 2 statement being made under oath like your 3 testimony today? 4 A. Yes. 5 Q. So you knew how important it was to 6 tell the truth? 7 A. Yes. 8 Q. The whole truth; correct? 9 MR. RAMSEY: Form. 10 A. Yes. 11 Q. And nothing but the truth; correct? 12 MR. RAMSEY: Form. 13 A. Yes. 14 Q. So item 3 you wrote in this affidavit 15 "Presently 79 percent of Eber Connecticut is owned 16 by me through an entity known as Eber Metro." 17 Was that a true statement? 18 MR. RAMSEY: Form. 19 A. If that's what I said at the time and 20 signed it, yes. 21 Q. So it is your understanding that at 22 the time that you signed this Eber Connecticut or 23 Eber Metro was not owned by the trust? 24 A. Yes. 25 Q. And you said that item number 4 though</p>	<p style="text-align: right;">Page 121</p> <p>1 L. Eber 2 Q. So you were making it clear that you 3 were telling the recipient of this affidavit that 4 Eber Metro was wholly owned by you; correct? 5 MR. RAMSEY: Form. 6 A. Yes. 7 Q. And you said in item number 5 "This 8 transfer is being done for no consideration." 9 Do you see that? 10 A. Yes. 11 Q. What did you mean by that? 12 A. It is whatever it says. No 13 consideration. 14 Q. So no consideration means nothing is 15 being received by Eber Metro in return for giving 16 up the 79 percent of Eber Connecticut; is that 17 right? 18 MR. RAMSEY: Form. 19 A. I didn't write this and I would have 20 to talk to whoever did write this to explain it to 21 me. 22 Q. Who wrote this? 23 A. I think it's probably something that 24 the Consumer Protection Agency of The State of 25 Connecticut required.</p>

Page 122		Page 124
1	L. Eber	1 L. Eber
2	Q. That doesn't answer who wrote this.	2 Q. You yourself were a co-trustee of the
3	A. I don't know.	3 trust; correct?
4	Q. So was it true that you wanted to	4 A. Yes.
5	transfer the 79 percent of Eber Connecticut to	5 Q. So why didn't you just transfer the
6	Lester Eber LLC for no consideration?	6 stock to yourself?
7	MR. RAMSEY: Form.	7 A. I didn't do it.
8	A. I can't explain that to you.	8 Q. Why not?
9	Q. Let's jump ahead in time for a little	9 A. I just didn't. I don't have an answer
10	bit here to late 2016 through 2017.	10 for you.
11	Around the time when this lawsuit was	11 Q. Did you think that you had the power
12	first filed and months afterwards, do you recall	12 or authority to do that?
13	that at that point you sought to acquire all of	13 A. I don't know. It's possible I did. I
14	the shares of Eber Brothers and Co., Inc. from the	14 just didn't do it.
15	Allen Eber Trust?	15 MR. BROOK: I think this next segment
16	A. Yeah. I believe so.	16 is going to be best done on one continuous
17	Q. What did you offer to provide to the	17 whole. So why don't we go ahead and break
18	Allen Eber Trust in exchange for that?	18 for lunch right now.
19	A. I don't remember the transaction. I	19 THE VIDEOGRAPHER: We are going off
20	was not -- I was aware of it but I was not	20 the record. The time is 12:20.
21	actually into the details of it.	21 (Luncheon recess: 12:20 p.m.)
22	Q. Did you have any lawyer who was	22
23	helping you try to acquire Eber Brothers and Co.,	23
24	Inc.?	24
25	A. Yes.	25
Page 123		Page 125
1	L. Eber	1 L. Eber
2	Q. Who was that?	2 A F T E R N O O N S E S S I O N .
3	A. John Herbert.	3 (12:57 p.m.)
4	Q. Anyone else?	4 L E S T E R E B E R ,
5	A. I believe he was the lawyer.	5 having been previously sworn, resumed the
6	Q. Who is Jim Vazzana?	6 stand and testified further as follows:
7	A. Yes. He is trust and estate lawyer.	7 EXAMINATION (Cont'd)
8	Q. Is he a lawyer that you hired?	8 BY MR. BROOK:
9	A. Yes.	9 THE VIDEOGRAPHER: We are going back
10	Q. To represent you individually?	10 on the record. The time is 12:59.
11	A. Yes.	11 Q. After breaking for lunch Mr. Eber,
12	Q. And did you also ask him to help you	12 were you able to get some food?
13	acquire the stock of Eber Brothers and Co., Inc.?	13 A. Yes.
14	A. I believe so at one time.	14 Q. And are you feeling okay to continue
15	Q. Why did you want the Eber Brothers and	15 this deposition?
16	Co., Inc. stock at that time?	16 A. Yes.
17	A. You know, I just don't remember the	17 Q. Any reason at all you can think of why
18	details of it.	18 you wouldn't be able to provide full and truthful
19	Q. But you asked for the stock on	19 testimony?
20	multiple occasions; correct?	20 A. No.
21	A. I believe so, yes.	21 Q. After this lawsuit was filed, did you
22	Q. And let's -- withdrawn.	22 become aware of the plans by your co-trustee
23	Who was it that you were asking to	23 Canandaigua National Bank and Trust to seek a
24	authorize the transfer of the stock?	24 judicial order terminating the trust?
25	A. I don't understand the question.	25 A. Yes.

<p style="text-align: right;">Page 126</p> <p>1 L. Eber 2 Q. How did you find out about that? 3 A. I believe my lawyer Vazzana told me 4 about it. 5 Q. Did you know about that before it was 6 filed in the court? 7 A. No. 8 Q. And so you appointed Mr. Vazzana to be 9 your lawyer for that court proceeding; correct? 10 A. Yes. 11 Q. Had he represented you on anything 12 before then? 13 A. Yes. 14 Q. What? 15 A. Personal issues. 16 Q. How long had he been representing you 17 for personal issues? 18 A. I don't remember. Could have been a 19 couple of years. I don't remember. 20 Q. Did any of those personal issues 21 concern the Allen Eber Trust? 22 A. No. 23 Q. What was your understanding of what 24 would happen with the assets or what was going to 25 happen with the assets of the Allen Eber Trust if</p>	<p style="text-align: right;">Page 128</p> <p>1 L. Eber 2 of the assets? 3 A. No. 4 Q. And you understood that the assets 5 included the trust stock in Eber Brothers and Co., 6 Inc.; correct? 7 MR. RAMSEY: Form. 8 A. You know, I think that was 9 questionable. I can't give you an answer on that. 10 I don't know. 11 Q. What was questionable about that? 12 A. I don't know of the status of what the 13 stock was or wasn't and I think that would be a 14 question you would have to ask my lawyer. 15 MR. BROOK: Let's mark this as the 16 next exhibit Plaintiffs' 32. 17 (Plaintiffs' Exhibit 32, a letter 18 and some attachments that are dated July 12, 19 2017 from Rita Nischal of Canandaigua 20 National Bank and Trust to Lester Eber, 21 marked for identification, as of this date.) 22 MR. BROOK: Go ahead and do 33 as 23 well. 24 (Plaintiffs' Exhibit 33, a order in 25 the Surrogates Court of The State of New</p>
<p style="text-align: right;">Page 127</p> <p>1 L. Eber 2 Canandaigua National Bank had been successful in 3 terminating the trust? 4 A. Never would happen with the 5 disbursement of the trust. You know, whatever the 6 procedure was. I didn't know. 7 Q. You didn't know what would happen with 8 the assets? 9 A. The assets would be distributed among 10 the trustees. Not the trustees. The 11 beneficiaries, excuse me. 12 Q. How would the percentages or amounts 13 of distribution be determined? 14 A. By the percentage of the trustees. 15 You know, there were -- not the trustees. Excuse 16 me, by the beneficiaries divided three ways which 17 would also Danny and his sister would split one of 18 the thirds. 19 Q. So it was going to be divided into 20 thirds between one third going to you, one third 21 going to Audrey Hays and one third being split 22 between Lisa Stein and Dan Kleeberg; is that 23 right? 24 A. Yes. 25 Q. And did you oppose that distribution</p>	<p style="text-align: right;">Page 129</p> <p>1 L. Eber 2 York in Monroe County dated June 1, 2017 3 signed by Surrogate Judge John M. Owens, 4 marked for identification, as of this date.) 5 Q. You have Exhibits 32 and 33 in front 6 of you. Exhibit 32 is a letter and some 7 attachments that are dated July 12, 2017 from Rita 8 Nischal, N-I-S-C-H-A-L, of Canandaigua National 9 Bank and Trust to Lester Eber. 10 And Exhibit 33 is a order in the 11 Surrogates Court of The State of New York in 12 Monroe County dated June 1, 2017 signed by 13 Surrogate Judge John M. Owens. 14 Have you seen either or both of these 15 documents before Mr. Eber? 16 A. Yes. 17 Q. When did you see the judicial order 18 Exhibit 33? 19 A. I don't remember. 20 Q. Was it around the time that the order 21 was entered? 22 A. It was whenever my lawyer sent it to 23 me. 24 Q. And do you have any reason to doubt 25 that your lawyer sent it to you promptly after</p>

33 (Pages 126 - 129)

<p style="text-align: right;">Page 130</p> <p>1 L. Eber 2 receiving it himself? 3 A. No. 4 Q. And Exhibit 32, when did you see that? 5 A. I saw it when it was sent to me. It 6 is July 12th. So whenever that time period. 7 Q. Did you review the documents that were 8 enclosed with it? 9 A. Yes. 10 Q. Look at page 2 of this exhibit. 11 It says receipt and release in the 12 upper right-hand corner? 13 A. Yes. 14 Q. Did you ever sign a receipt and 15 release for Canandaigua National Bank? 16 A. You know, I don't think I did, but I 17 could have. I don't remember. 18 Q. Take a look at page 3. 19 You see it is a table saying residuary 20 TUW Allen Eber proposed distribution? 21 A. Yes. 22 Q. And you saw that too; correct? 23 A. Yes. 24 Q. And so you saw presumably that listed 25 on the assets here was three line items for Eber</p>	<p style="text-align: right;">Page 132</p> <p>1 L. Eber 2 the Allen Eber Trust was distributed to the 3 beneficiaries of the trust? 4 A. Yes. 5 Q. Did you insist that there be certain 6 adjustments made to the distribution after you saw 7 this chart page 3 of Exhibit 32? 8 MR. RAMSEY: Form. 9 A. (Indicating.) 10 Q. Yes. 11 A. I don't remember. 12 MR. BROOK: Let's mark this next 13 exhibit Plaintiffs' Exhibit 34. 14 (Plaintiffs' Exhibit 34, a letter 15 and attachments that was produced yesterday 16 by Canandaigua National Bank Bates stamped 17 CNB-PL 0010 through 12, marked for 18 identification, as of this date.) 19 Q. Exhibit 34 in front of you is a letter 20 and attachments that was produced yesterday by 21 Canandaigua National Bank and is Bates stamp by me 22 as CNB-PL 0010 through 12. 23 Do you recognize this document? 24 A. Yes. 25 Q. What is it?</p>
<p style="text-align: right;">Page 131</p> <p>1 L. Eber 2 Brothers and Co. stock? 3 A. Yes. 4 Q. And this shows that stock being 5 distributed in roughly the proportions you said 6 the trust assets should be distributed; correct? 7 A. That I had said? 8 Q. Well, you previously testified that 9 you understood that the distribution would be one 10 third to you, one third to Audrey Hays and one 11 third split between Dan Kleeberg and Lisa Stein? 12 A. Yes. 13 Q. And this reflects close to that 14 distribution; correct? 15 A. Yes. 16 Q. Did you have any objection to that 17 distribution of shares of Eber Brothers and Co. 18 stock as specified in this proposed distribution 19 chart? 20 A. I don't remember it. I could have. 21 There has been some discussion about it, but I 22 don't remember what I said or didn't say or what 23 our position was. 24 Q. It is your understanding ultimately 25 the publicly traded stocks and the cash held by</p>	<p style="text-align: right;">Page 133</p> <p>1 L. Eber 2 A. It's a letter to Canandaigua Bank 3 reducing the money to Lisa Stein from the money 4 that was given by the trust to her daughter Erica 5 Stein. 6 Q. And is this a letter that you asked to 7 have sent on your behalf? 8 A. I am copied on it. So I was aware of 9 it. 10 Q. Did you authorize Mr. Vazzana to send 11 it? 12 A. I was aware of it and I was involved 13 in that knew what was going on. I was aware of 14 it. That's what I can say to you. 15 Q. Were you aware of the letter going out 16 before it was sent? 17 A. Yes. 18 Q. This was not the first letter that was 19 sent on your behalf asking Canandaigua National 20 Bank to reduce the amount of distribution from the 21 trust to Lisa Stein, was it? 22 MR. RAMSEY: Form. 23 A. No. You are asking questions that 24 show in the other letters. So you know the 25 answer.</p>

<p style="text-align: right;">Page 134</p> <p>1 L. Eber</p> <p>2 Q. Why did you want the amount of 3 distribution from the trust to Lisa Stein reduced 4 versus what Canandaigua had proposed?</p> <p>5 A. I believe the reason and you say me, I 6 think there were other people involved in this as 7 you see who were copied, lawyers, that there was 8 money had been given to, from the trust to her 9 daughter.</p> <p>10 Q. So you wanted to make sure that only 11 the cost of the money being given to Lisa Stein's 12 daughter was borne solely by Lisa Stein; is that 13 right?</p> <p>14 A. It was for her daughter out of Lisa 15 Stein's money, the money that was to go to Lisa 16 Stein. The trust, the way I understood it, took 17 the money out of Lisa Stein's account.</p> <p>18 Q. And is it your understanding that 19 based on your request Canandaigua National Bank 20 the amount of the distribution to Lisa Stein was 21 reduced in full by the amount that had been paid 22 previously to Erica Stein?</p> <p>23 A. Yes.</p> <p>24 Q. And is there any amount of money 25 that's still owed back to the other trust</p>	<p style="text-align: right;">Page 136</p> <p>1 L. Eber</p> <p>2 MR. RAMSEY: Form.</p> <p>3 Go ahead.</p> <p>4 A. I believe that it is a legal question 5 and I am not a lawyer.</p> <p>6 Q. What was your belief as of July 2017 7 about the value of the Eber Brothers and Co., Inc. 8 stock?</p> <p>9 MR. RAMSEY: Form.</p> <p>10 A. As I thought it was worthless.</p> <p>11 Q. Why did you believe that?</p> <p>12 A. Because it had no assets. What were 13 the assets.</p> <p>14 Q. Why did you want to obtain the shares 15 of Eber Brothers and Co., Inc. stock for yourself?</p> <p>16 A. I think, as I told you before, I think 17 it is a legal question that you should ask the 18 lawyers. I am not capable of answering it.</p> <p>19 Q. Was your goal to try to prevent 20 plaintiffs from pursuing their lawsuit against 21 you?</p> <p>22 MR. RAMSEY: Form.</p> <p>23 A. I said ask the lawyers. I don't have 24 an answer for you.</p> <p>25 MR. BROOK: Let's go to this next</p>
<p style="text-align: right;">Page 135</p> <p>1 L. Eber</p> <p>2 beneficiaries by Lisa Stein?</p> <p>3 A. Not that I know.</p> <p>4 Q. Did you ask the Canandaigua National 5 Bank also reduce the number of shares of Eber 6 Brothers and Co. Inc. that were distributed to 7 Lisa Stein?</p> <p>8 A. Did I, no. I don't remember that. I 9 don't remember that, no.</p> <p>10 Q. Can you think of any reason why the 11 number of shares that Eber Brothers and Co., Inc. 12 should have been reduced, the numbers of shares -- 13 let me restart this.</p> <p>14 Can you think of any reason why the 15 trusts distribution of shares of Eber Brothers and 16 Co., Inc. should have been reduced for Lisa Stein 17 based upon either the prior distributions to Erica 18 Stein or for any other reason?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A. I think --</p> <p>21 MR. BROOK: I will withdraw that.</p> <p>22 That was still bad.</p> <p>23 Q. So can you think of any reason why the 24 trusts distribution of Eber Brothers and Co., Inc. 25 shares to Lisa Stein should have been reduced?</p>	<p style="text-align: right;">Page 137</p> <p>1 L. Eber</p> <p>2 Exhibit 35.</p> <p>3 (Plaintiffs' Exhibit 35, a e-mail 4 and attachment dated October 31, 2018 sent 5 by Paul Keneally with multiple recipients 6 CNB-PL 0001 to 2, marked for identification, 7 as of this date.)</p> <p>8 Q. Exhibit 35 in front of you is a e-mail 9 and attachment dated October 31, 2018 sent by Paul 10 Keneally with multiple recipients CNB-PL 0001 to 11 2.</p> <p>12 Have you seen this before?</p> <p>13 A. I signed it, so I must have.</p> <p>14 Q. You're referring to the second page of 15 the exhibit?</p> <p>16 A. Behind it, yeah.</p> <p>17 Q. So that is your signature?</p> <p>18 A. Yes.</p> <p>19 Q. And do you remember signing this 20 document?</p> <p>21 A. I don't remember, but I did sign it.</p> <p>22 Q. How do you know that you signed it if 23 you don't remember it?</p> <p>24 A. That's my signature. So nobody is 25 putting my -- that's my signature on it.</p>

<p style="text-align: right;">Page 138</p> <p>1 L. Eber 2 Q. The second page is addressed to the 3 Allen Eber Trust care of the Canandaigua National 4 Bank and Trust Company; correct? 5 A. Yes. 6 Q. And it says in all caps below that 7 notice of intent to purchase shares; correct? 8 A. Yes. 9 Q. Then the body of it states "The 10 undersigned hereby gives notice of my intent to 11 purchase all shares of capital stock of Eber 12 Brothers and Co., Inc. defined as the company of 13 which the Allen Eber Trust is the registered 14 holder that are proposed to be transferred to 15 Daniel Kleeberg, Lisa Stein or Audrey Hays 16 pursuant to Article 12 of the bylaws of the 17 company." Then your signature. 18 Did I read that correctly? 19 A. Yes. 20 Q. What was your purpose in sending this 21 notice of intent? 22 A. If you look at the bylaws of the 23 company I had the right to do it. 24 Q. Why do you say that? 25 A. Read the bylaws.</p>	<p style="text-align: right;">Page 140</p> <p>1 L. Eber 2 A. You have to ask my lawyer. 3 Q. So you signed this without knowing how 4 much money you were committing to pay? 5 MR. RAMSEY: Form. 6 A. I signed it. I don't have an answer 7 for you on that. I think it's a legal question. 8 Q. So for all you know you might need to 9 pay the plaintiffs over two million dollars each 10 in order to get the shares that you agreed to 11 purchase? 12 MR. RAMSEY: Form. 13 A. No. 14 Q. Why do you say no? 15 A. Because it isn't worth it. 16 Q. Well, why do you say that? 17 A. What's the -- where does it show that 18 it is worth that kind of money? Can you show 19 that? 20 Q. Again, if it is not -- if you don't 21 know how much the shares are worth, then how can 22 you agree to purchase them? 23 MR. RAMSEY: Form. 24 A. I told you I am not qualified to 25 answer your question. Please consult my lawyer.</p>
<p style="text-align: right;">Page 139</p> <p>1 L. Eber 2 Q. Did you read the bylaws? 3 A. I have. 4 Q. And it is your belief that the bylaws 5 of the company permitted you to purchase the 6 shares of capital stock of Eber Brothers and Co. 7 stock? 8 A. On the advice of counsel, yes. 9 Q. Why did you wait until October 31, 10 2018 to send this notice? 11 A. Ask my lawyer. 12 Q. Now you knew that Canandaigua National 13 Bank and Trust Company had proposed to and 14 attempted to transfer the Eber Brothers and Co., 15 Inc. shares to Dan Kleeberg, Lisa Stein and Audrey 16 Hays a year before this date; correct? 17 MR. RAMSEY: Form. 18 A. If you are saying that you probably 19 have something that shows that. I don't remember. 20 Q. And you said here, what you signed 21 your name to, you intended to purchase the shares; 22 correct? 23 A. That's what it says here. 24 Q. How much money did you intend to 25 purchase the shares for?</p>	<p style="text-align: right;">Page 141</p> <p>1 L. Eber 2 Q. So you are authorizing us to ask these 3 questions of your lawyer? 4 DI MR. RAMSEY: Don't answer that. 5 MR. BROOK: I think he already did, 6 but I am just trying to make it clear. 7 MR. CALIHAN: I don't agree, but. 8 MR. BROOK: I know. 9 Let's do two more exhibits after that. 10 We are up to 36 and 37. 11 (Plaintiffs' Exhibit 36, a printout 12 of a table with some notes entitled 13 Residuary TUW Allen Eber Proposed 14 Distribution of Securities, marked for 15 identification, as of this date.) 16 (Plaintiffs' Exhibit 37, a e-mail 17 dated September 15, 2017 sent by Jim Vazzana 18 to R. Nischal at CNB, Canandaigua National 19 Bank, with yourself as one of the people 20 copied on it Bates stamped CNB-PL 0005, 21 marked for identification, as of this date.) 22 Q. Looking first at Exhibit 36. This is 23 a printout of a table with some notes entitled 24 Residuary TUW Allen Eber Proposed Distribution of 25 Securities.</p>

36 (Pages 138 - 141)

<p style="text-align: right;">Page 142</p> <p>1 L. Eber 2 Do you see that? 3 A. Yes. 4 Q. And have you seen this version of the 5 chart before? 6 A. Yes. 7 Q. When do you recall first seeing this? 8 A. I don't remember. 9 Q. Do you see that this table also 10 includes distribution numbers for the shares of 11 Eber Brothers and Co. stock held by the trust? 12 A. Yes. 13 Q. Do you recall making any objection to 14 the distribution proposed in this chart after you 15 saw it? 16 A. I don't remember. 17 Q. After you saw this chart, do you 18 recall contacting anyone and saying you wanted to 19 buy the shares of Eber Brothers and Co., Inc. 20 stock that were proposed to be distributed to 21 Daniel Kleeberg, Lisa Stein and Audrey Hays? 22 MR. RAMSEY: Form. 23 A. I don't remember. 24 Q. Please take a look at Exhibit 37 now 25 which is a e-mail dated September 15, 2017 sent by</p>	<p style="text-align: right;">Page 144</p> <p>1 L. Eber 2 MR. RAMSEY: You can answer that. 3 A. Yes. 4 Q. And so is it fair to say that as of 5 September 15, 2017 you agreed with the proposed 6 distribution that Canandaigua National Bank had 7 sent to you? 8 MR. RAMSEY: Form. 9 A. No, I don't. This is only to sign a 10 release. 11 Q. Okay, so what did you understand to be 12 the significance of signing or not signing a 13 release? 14 A. Whatever liability that would waive or 15 what have you. 16 MR. BROOK: Let's go to the next 17 Exhibit 38. 18 (Plaintiffs' Exhibit 38, a letter 19 dated October 11, 2017 on letterhead for 20 Woods Oviatt Gilman LLP addressed to Jim 21 Vazzana and me, marked for identification, 22 as of this date.) 23 Q. Exhibit 38 is a letter dated October 24 11, 2017 on letterhead for Woods Oviatt Gilman LLP 25 addressed to Jim Vazzana and me.</p>
<p style="text-align: right;">Page 143</p> <p>1 L. Eber 2 Jim Vazzana to R. Nischal at CNB, Canandaigua 3 National Bank, with yourself as one of the people 4 copied on it Bates stamped CNB-PL 0005. 5 Do you see that? 6 A. Yes. 7 Q. Do you recognize this e-mail? 8 A. I assume I saw it. It was sent. I 9 was copied on. 10 Q. In this e-mail, which was sent by your 11 lawyer, it begins by saying "Dear Rita, as you 12 know we represent Lester Eber and he and the other 13 beneficiaries are reticent to sign a release and 14 receipt as submitted. However, he will sign it 15 without the release provision." 16 Do you see that? 17 A. Yes. 18 Q. So you had talked to your lawyer about 19 signing a receipt prior to him sending this 20 e-mail; correct? 21 MR. RAMSEY: Well, hold on. 22 Don't tell him what you talked to your 23 lawyer about. 24 Q. Did you authorize your lawyer to send 25 this e-mail?</p>	<p style="text-align: right;">Page 145</p> <p>1 L. Eber 2 Do you see that? 3 A. Yes. 4 Q. Have you seen this letter before? 5 A. You know I don't remember. It doesn't 6 show me copied on it, but I could have. I don't 7 remember. 8 Q. And do you recall seeing that there 9 were stock powers that were signed by someone from 10 Canandaigua National Bank purporting to transfer 11 to you shares in Eber Brothers and Co., Inc.? 12 A. Could you repeat the question? 13 Q. Sure. 14 Do you recall seeing that around the 15 time of this letter there were stock powers that 16 had been signed by someone from Canandaigua 17 National Bank and Trust purporting to transfer 18 Eber Brothers and Co., Inc. stock to you? 19 A. I don't remember. 20 Q. Do you know what stock powers are? 21 A. Yes. 22 Q. What are stock powers? 23 A. The ability to vote the stock. 24 Q. And how do the stock powers once 25 executed get turned into actual voting rights for</p>

<p style="text-align: right;">Page 210</p> <p>1 L. Eber 2 bearing the caption of Alexbay versus Eber 3 Brothers and it states it is the affidavit 4 of Lester Eber bearing Bates numbers EB 5 00001059 through 1063, marked for 6 identification, as of this date.) 7 Q. Exhibit 45 is a document bearing the 8 caption of Alexbay versus Eber Brothers and it 9 states it is the affidavit of Lester Eber bearing 10 Bates numbers EB 00001059 through 1063. 11 Do you recognize this document? 12 A. Yes. 13 Q. What is it? 14 A. It's an affidavit in support of 15 judicial determination for commercial 16 reasonableness under UCC 9-627. 17 Q. And that's your signature on the last 18 page of this document; correct? 19 A. Yes. 20 Q. It states below your signature that it 21 was sworn before a notary public on the 14th day 22 of March 2012. 23 Do you see that? 24 A. Yes. 25 Q. You understood this was a statement</p>	<p style="text-align: right;">Page 212</p> <p>1 L. Eber 2 Q. Based upon your knowledge of the Eber 3 Metro, Eber Connecticut business, which sales do 4 you think you were referring to? 5 A. I don't remember. 6 Q. And you can't determine what sales you 7 were referring to based upon your knowledge of the 8 company? 9 A. I just don't remember. It is December 10 of 2011. 11 Q. Why are you reluctant to state that 12 the sales you were referring to were the sales of 13 six percent to Polebridge Bowman? 14 MR. CALIHAN: Objection to form. 15 MR. RAMSEY: Form. That's not what he 16 said. 17 A. I didn't say that. 18 Q. Besides Polebridge Bowman, what other 19 sales could you have possibly been referring to? 20 A. I don't remember. 21 Q. I am not asking you what you remember. 22 I am asking you as you sit here today. 23 A. I don't know. 24 Q. So you can't think of anything else 25 you might have been referring to?</p>
<p style="text-align: right;">Page 211</p> <p>1 L. Eber 2 under oath like today's deposition; correct? 3 A. Yes. 4 Q. Did you review this document carefully 5 before you signed it? 6 A. Yes. 7 Q. And you knew that this was a document 8 that the court might rely upon in deciding whether 9 to find the transaction that you had proposed to 10 be commercially reasonable or not; correct? 11 A. Yes. 12 MR. RAMSEY: Form. 13 Q. Please turn to the second page 14 paragraph 6. 15 Are you there? 16 A. Yes. 17 Q. That states "Based upon very recent 18 arms length sales on the open market, Eber Conn's 19 value as a going concern is best established at 20 4,633,300 dollars as of December 2011." 21 Do you see that? 22 A. Yes. 23 Q. What sales were you referring to in 24 that sentence? 25 A. I don't know. I don't remember.</p>	<p style="text-align: right;">Page 213</p> <p>1 L. Eber 2 MR. RAMSEY: Form. 3 A. As I told you, going back to 2011 I 4 don't remember. 5 Q. How many times has Eber Connecticut, 6 how many times has Eber Connecticut membership 7 units ever been sold? 8 A. The only ones I remember are 9 Eder-Goodman and Polebridge Bowman. 10 Q. And then besides those two 11 transactions, there was also a third transaction 12 in which the Polebridge Bowman shares were 13 transferred to your daughter; correct? 14 A. Yes. 15 Q. But that was not a sale; correct? 16 A. I am not a lawyer. The lawyers 17 handled that and I can't give you an answer to it. 18 I think you have to ask a lawyer. 19 Q. To your knowledge, did Wendy pay 20 anything to Polebridge Bowman to acquire its 21 shares? 22 MR. RAMSEY: Form. 23 A. I do not know. You know, I know the 24 transaction took place, but I do not know the 25 details of the transaction.</p>

<p style="text-align: right;">Page 254</p> <p>1 L. Eber 2 as of this date.) 3 Q. Exhibit 47 is a two-page letter on the 4 letterhead for Elliot W. Gumaer, Jr. dated January 5 2, 2001 Bates stamped January 8, 2001 and Bates 6 number EB 00001556 to 57. 7 Do you recognize this document? 8 A. Yes. 9 Q. What is it? 10 A. It is a letter from Mike Gumaer to 11 myself about his retirement from Nixon Peabody. 12 Q. And do you see on the back page there 13 is a line below the signature of Mike Gumaer 14 stating the terms and conditions of this letter 15 are agreed by the Eber companies? 16 A. Yes. 17 Q. And is that your signature below? 18 A. Yes. 19 Q. Do you remember signing this document? 20 A. I don't remember signing it but I did. 21 It is January of '01. 22 Q. And when is the last time that you 23 remember seeing this document? 24 A. I don't remember. 25 Q. Do you have any reason to believe that</p>	<p style="text-align: right;">Page 256</p> <p>1 L. Eber 2 propose to you the following A, I shall continue 3 to waive any direct annual compensation as a 4 trustee of the Allen Eber Trust. B, I shall 5 continue as a director of the Eber companies 6 without any compensation commensurate with my 7 responsibilities as a director. And C, I shall 8 continue to serve as a consultant to the companies 9 and as counsel to you personally and as chief 10 executive officer." 11 Do you see that? 12 A. Yes. 13 Q. The letter then continues in the next 14 paragraph, "As compensation for all of these 15 duties the Eber companies will pay me an annual 16 consulting fee of forty thousand dollars payable 17 quarterly on the first of February, May, August 18 and November beginning February 1, 2001. This 19 relationship shall remain in place until modified 20 by you and me in the manner established by this 21 letter." 22 Do you see that? 23 A. Yes. 24 Q. And you agreed to those terms that he 25 proposed?</p>
<p style="text-align: right;">Page 255</p> <p>1 L. Eber 2 there are any amendments to this letter agreement? 3 A. I don't know. I don't remember. I 4 don't know. 5 Q. Turning to the second page at the top, 6 do you see he, Mike writes "As a director and 7 consultant to the companies I have endorsed your 8 strategic plan to grow our companies thus enabling 9 us to compete in an industry that's changed 10 radically over the years since your father's 11 death." 12 Do you see that? 13 A. Yes. 14 Q. Do you know what he meant by referring 15 to himself as a consultant to the companies? 16 A. Yeah. He was into the business. My 17 father put him right into the business to work 18 with me and help me. 19 Q. So is it fair to say that Mike Gumaer 20 did nonlegal work for the companies? 21 MR. RAMSEY: Form. 22 A. He did legal work. He did consulting. 23 He did everything. 24 Q. Second paragraph on page 2 reads "With 25 the foregoing as historical records I would</p>	<p style="text-align: right;">Page 257</p> <p>1 L. Eber 2 A. Yes. 3 Q. How long did the annual consulting fee 4 of forty thousand dollars continue for? 5 A. As long as we could pay it and I don't 6 have the date that it changed, but it had to be 7 after Wells foreclosed on us and we didn't have 8 the money to pay him. 9 Q. After that point was his consulting 10 fee reduced? 11 A. Yes. 12 Q. What was it reduced to? 13 A. I don't remember. 14 MR. BROOK: Let's go to the next 15 exhibit. This will be Plaintiffs' Exhibit 16 48. 17 (Plaintiffs' Exhibit 48, an e-mail 18 from Mike Gumaer to Wendy Eber and Lester 19 Eber dated October 29, 2013 bearing Bates 20 number GUM 000023, marked for 21 identification, as of this date.) 22 Q. Exhibit 48 is an e-mail from Mike 23 Gumaer to Wendy Eber and Lester Eber dated October 24 29, 2013 bearing Bates number GUM 000023. 25 Do you recognize this document?</p>

<p style="text-align: right;">Page 258</p> <p>1 L. Eber 2 A. I got it so I do, yes. 3 Q. I would like to draw your attention to 4 the second paragraph of Mike's e-mail. He writes 5 "You will recall I hope our conversation last 6 December when I was asked to continue as 7 director/trustee/confidant." 8 Do you see that? 9 A. Yes. 10 Q. "While I was prepared to conclude my 11 relationship after 40 or so years, I was happy to 12 continue. My annual compensation for some time 13 has been twenty two thousand dollars payable in 14 quarterly installments." 15 Do you see that? 16 A. Yes. 17 Q. Does that refresh your recollection as 18 to what the compensation amount was reduced to 19 from forty thousand dollars? 20 A. I knew it was reduced but I didn't 21 remember the amount. 22 Q. And is it your best recollection that 23 twenty two thousand dollars was the amount? 24 A. It is very possible. 25 Q. Which of the Eber companies was</p>	<p style="text-align: right;">Page 260</p> <p>1 L. Eber 2 A. Would you repeat that again for me? 3 Q. Sure. 4 The proposal that Mike had made in 5 2001 is that he would -- 6 A. Yes. 7 Q. -- be counsel to you personally -- 8 A. Yes. 9 Q. -- as chief executive officer without 10 seeking compensation beyond an annual consulting 11 fee of forty thousand dollars? 12 A. Yes. That would be consistent. 13 Q. To whom did you disclose the terms of 14 your engagement of Mike Gumaer pursuant to this 15 letter? 16 A. To this letter it would be Wendy Eber. 17 Q. And were these terms disclosed to 18 anyone else? 19 A. I don't -- I don't believe so. 20 Basically when Eber could have been I don't know. 21 I would like you to read the last paragraph. 22 Q. You are talking about the last 23 paragraph on Exhibit 48? 24 A. Yes. You like to read paragraphs. So 25 I'd like you to.</p>
<p style="text-align: right;">Page 259</p> <p>1 L. Eber 2 responsible for paying Mike Gumaer's consulting 3 fee? 4 A. Eber Wine and Liquor originally paid 5 him. 6 Q. And at a certain point was the 7 responsibility changed to Eber Connecticut? 8 A. Yes. 9 Q. What about after the Alexbay 10 acquisition of Eber Connecticut, who paid the 11 consulting fee then? 12 A. I believe -- I don't know. I would 13 have to find out. I don't know. 14 Q. Is it correct that at some point the 15 consulting fee was reduced even more below twenty 16 two thousand dollars? 17 A. It is very possible. 18 Q. Did you ever pay Mike Gumaer directly 19 for work that he did as an attorney for you 20 personally? 21 A. I don't remember. I believe most of 22 it was paid through the company. 23 Q. And that procedure that you just 24 described would be consistent with the proposal 25 that Mike made in Exhibit 47; correct?</p>	<p style="text-align: right;">Page 261</p> <p>1 L. Eber 2 Q. If you would like to read it aloud I 3 will allow you to do so now. 4 A. No, you're the -- 5 MR. RAMSEY: You want to read it go 6 ahead. 7 A. Yeah. I am taking over your job. 8 "I wish to accommodate you two as 9 members of a team. Lord knows that Lester has 10 committed an incredible amount to bring about the 11 company's success. I am prepared to do my share 12 if the kitty calls for it. Please give me your 13 thoughts. All the best, Mike." 14 Q. Do you have an understanding as to 15 what Mike meant when he said I am prepared to do 16 my share if the kitty calls for it? 17 A. I think -- I just think he wants -- 18 supportive as he can be to help us through a 19 difficult period. 20 Q. Now the two sentences immediately or 21 the three sentences I guess it is actually -- I am 22 not going to count the number of sentences. Let's 23 read the part in between the part that I read 24 earlier and the part that you just read. It says 25 "I have been paid eleven thousand dollars so far</p>

<p style="text-align: right;">Page 278</p> <p>1 L. Eber 2 know this was December 18, 2012 and the 3 foreclosure was in February; wasn't it? So they 4 didn't hold Connecticut if that's the... 5 Q. When you saw this at the time in 6 December of 2012, did you do anything to try to 7 correct the misstatement? 8 MR. RAMSEY: Form. 9 A. I think they -- there were -- Wendy 10 Eber did do something on that to get it because it 11 wasn't right. 12 Q. What did Wendy Eber do? 13 A. I don't remember. But I know it was a 14 mistake and it is very possible he sent this out 15 without showing it to us. 16 Q. Why was it Wendy Eber's responsibility 17 to do anything to correct this letter sent by a 18 co-trustee? 19 MR. RAMSEY: Form. 20 A. She was the financial person who 21 watched the finances at that time. 22 Q. What finances? 23 A. CFO of the companies, the Eber 24 companies. 25 Q. Did she have any role or</p>	<p style="text-align: right;">Page 280</p> <p>1 L. Eber 2 Q. In hindsight, do you believe you 3 should have contacted either Audrey Hays or Sally 4 Kleeberg or both of them after you saw this 5 letter? 6 MR. RAMSEY: Form. Go ahead. 7 A. Yes. If I had seen it before it came 8 out I would have known that it should have been 9 corrected. 10 Q. I am going to show you a new exhibit. 11 This is I believe now 50. 12 (Plaintiffs' Exhibit 50, a chain of 13 two e-mails possibly another e-mail that 14 appears to have been redacted Bates number 15 EB 00031202, marked for identification, as 16 of this date.) 17 Q. Plaintiffs' Exhibit 50 is a chain of 18 two e-mails possibly another e-mail that appears 19 to have been redacted. The document bears Bates 20 number EB 00031202. The top e-mail is from Wendy 21 Eber to Lester Eber and Mike Gumaer dated January 22 10, 2013. The subject is Allen Eber Trust. 23 Do you see that? 24 A. Mm-hmm. 25 Q. Is that a yes?</p>
<p style="text-align: right;">Page 279</p> <p>1 L. Eber 2 responsibility in connection with the Allen Eber 3 Trust? 4 A. No. She was not involved in the Allen 5 Eber Trust. 6 Q. You were a co-trustee of the trust 7 though; is that right? 8 A. That's correct. 9 Q. So -- 10 A. As I told you, this letter shouldn't 11 have been sent out and it was a mistake and I 12 refer you to your deposition with Hawks which you 13 had in Rochester and I don't know if you are going 14 to see or talk to him again. This was something 15 that was handled by Richard Hawks. Now Richard, 16 what's his name? Yeah, Richard Hawks. 17 Q. Did you contact either Sally Kleeberg 18 or Audrey Hays after seeing this letter to advise 19 them of the sale or the transfer rather of the 20 Eber Connecticut business to Alexbay? 21 MR. RAMSEY: Form. 22 A. I don't remember doing that. 23 Q. Why not? 24 A. I don't know. 25 MR. CALIHAN: Objection to form.</p>	<p style="text-align: right;">Page 281</p> <p>1 L. Eber 2 A. Yes. 3 Q. The e-mail states "Lester and Mike, 4 attached is the December 2012 statement for the 5 trust of Allen Eber from Canandaigua Bank. It 6 values Eber stock at approximately 655,000 7 dollars. It should be zero per our conversation 8 in June with Rick Hawks. Regards Wendy." 9 Do you see that? 10 A. Yes. 11 Q. Do you know what valuation she is 12 referring to? 13 A. No. 14 Q. Do you know what the 655,000 dollars 15 number is? 16 A. No. 17 Q. Do you know where Canandaigua got that 18 number from? 19 A. No. 20 Q. Do you know what Wendy was referring 21 to when she referred to a conversation in June 22 with Rick Hawks? 23 A. I would believe that she told him that 24 it should be zero. That the Eber Brothers stock 25 should be valued at zero per our conversation in</p>

<p style="text-align: right;">Page 290</p> <p>1 L. Eber 2 marked. 3 Do you have that in front of you? 4 A. Yes. 5 Q. And comparing Exhibit 5 against 6 Exhibit 4, it appears that the paragraph that you 7 had asked to change was simply deleted in the 8 December 2013 letter? 9 A. Yes. 10 Q. So no correction of the fact was made? 11 MR. RAMSEY: Form. 12 Q. Is that right? 13 A. Looks like that. 14 Q. To your knowledge, did any of the 15 co-trustees or anyone on their behalf ever inform 16 either Audrey Hays or Sally Kleeberg or Sally 17 Kleeberg's children about the misstatement that 18 had been made in the December 18, 2012 letter? 19 MR. RAMSEY: Form. 20 A. I don't know. 21 Q. Did you ever discuss the transfer of 22 Eber Metro to Alexbay with any of Sally Kleeberg, 23 Audrey Hays, Dan Kleeberg or Lisa Stein? 24 A. I talked to my sister Sally. 25 Q. When was that?</p>	<p style="text-align: right;">Page 292</p> <p>1 L. Eber 2 say much when you talked to her? 3 A. It depends. She was very personable 4 and had a lot of friends and she just didn't say 5 much. 6 Q. Where did this conversation occur? 7 A. In a restaurant where we had dinner. 8 Q. Where was that? 9 A. In Buffalo. 10 Q. Do you recall the restaurant? 11 A. 800. 12 Q. Is this a restaurant that you 13 frequently went to? 14 A. She would go to. 15 Q. Did she live in the Buffalo area? 16 A. Yes. 17 Q. Was anyone else present for this 18conversation? 19 A. My wife was with me but she had 20 excused herself to go to the bathroom and it was 21 just the two of us. 22 Q. By the time your wife came back the 23conversation was over? 24 A. Yeah. It wasn't a long conversation. 25 Q. And after that conversation, did you</p>
<p style="text-align: right;">Page 291</p> <p>1 L. Eber 2 A. Could have been a year before she died 3 or so. 4 Q. Approximately, when was that? 5 A. It was in the summer when she died in 6 what, '14 or '15. Probably a year before I told 7 her about that. 8 Q. What did you tell her specifically? 9 A. That the company had lost a lot of 10 money and I had lent in a lot of money and that I 11 took it over to protect my interest. 12 Q. How did she respond? 13 A. She didn't -- I don't think she liked 14 it very much. 15 Q. Why do you say that? 16 A. She didn't respond very much. 17 Q. Do you recall anything that she said? 18 A. No. 19 Q. Do you recall -- 20 A. She -- 21 Q. Go ahead. 22 A. She didn't say much. 23 Q. Was she sick at that time? 24 A. No. 25 Q. Was she typically someone that didn't</p>	<p style="text-align: right;">Page 293</p> <p>1 L. Eber 2 make any effort to memorialize the fact what you 3 had told her? 4 A. I don't remember that. 5 Q. Why didn't you? 6 MR. RAMSEY: Form. 7 MR. CALIHAN: Form. 8 A. I have been absorbed by keeping the 9 company going and seeing that it's viable and not 10 going into liquidation. 11 Q. Was there any benefit to either of the 12 other trust beneficiaries at the time Audrey Hays 13 or Sally Kleeberg from your transferring Eber 14 Metro to Alexbay? 15 MR. RAMSEY: Form. 16 A. Benefit? 17 Q. Did it benefit them in any way? 18 A. I don't know. I don't have an answer 19 for you. 20 Q. Did you think about whether it 21 benefitted them at the time that you did it? 22 MR. RAMSEY: Form. 23 A. I thought about -- no. I thought 24 about keeping Connecticut viable and not facing 25 liquidation. That's what my thinking was about.</p>

<p style="text-align: right;">Page 294</p> <p>1 L. Eber 2 Q. So you weren't thinking about whether 3 that transaction would have any positive or 4 negative impact on the shareholders of the 5 company; is that right? 6 A. I was thinking about keeping the 7 company alive and if I didn't do it there wouldn't 8 be a business today. 9 Q. So that was a yes that you were not 10 thinking about the shareholders? 11 MR. CALIHAN: Objection to form. 12 MR. RAMSEY: Form. 13 A. I didn't say that. 14 Q. So walk me through your reasoning. 15 In what way did you consider the 16 shareholders' interests benefitted or harmed by 17 the Alexbay acquisition of Eber Metro? 18 A. I had asked the shareholders to 19 invest. They chose not to. I proceeded on my 20 own. I spent millions of dollars, lent. Paid 21 legal fees and I did not -- I was absorbed with 22 keeping the company alive. 23 Q. Did you -- sorry, go ahead. 24 A. That's it. 25 Q. Did you describe your request for</p>	<p style="text-align: right;">Page 296</p> <p>1 L. Eber 2 proud of what you did? 3 A. Yes. 4 MR. RAMSEY: Form. 5 Q. Why? 6 A. I did what I had to do to keep -- you 7 know, it is all speculation. So I did what I had 8 to do to survive to keep the company alive. 9 Q. Your father wanted the company to 10 remain with the full family; right? 11 A. Well, he took the family -- he took 12 the family really out of it and set up trusts 13 outside of the family that had control of 14 everything. 15 Q. So he wanted the business to remain 16 with the trust? 17 MR. RAMSEY: Form. 18 Q. Correct? 19 A. He just took family members out of it. 20 So I don't know what he did. I have no idea what 21 his thinking was. I never saw his will or 22 anything. I was handed a copy of his estate when 23 I first met Mr. Gumaer. I knew from nothing. 24 Q. Just to wrap this up, did you ever 25 discuss the transfer of Eber Metro to Alexbay with</p>
<p style="text-align: right;">Page 295</p> <p>1 L. Eber 2 money to either Audrey Hays or Sally Kleeberg as 3 an investment opportunity? 4 A. Originally I did and in original 5 letters I asked for them to invest. 6 Q. And did you make it sound like a very 7 good investment? 8 MR. RAMSEY: Form. 9 A. You see what it said. The letters 10 speak for themselves. 11 Q. Was the family business important to 12 your sister Sally? 13 A. Yes. I believe so. 14 Q. So wasn't it important for you to make 15 clear to her that you intended to take the company 16 for yourself and away from the rest of the family 17 if she didn't invest? 18 MR. RAMSEY: Form. 19 A. I didn't feel -- I asked her to 20 invest. I am not going to say to her what I was 21 going to do or not do. I did what I had to do to 22 keep the company alive to make -- so we can clean 23 up our statement and get a bank loan. Otherwise, 24 there wouldn't be a company. 25 Q. Do you think your father would be</p>	<p style="text-align: right;">Page 297</p> <p>1 L. Eber 2 anyone else in your family besides Sally Kleeberg 3 and Wendy Eber? 4 A. No. There wouldn't be anyone else to 5 discuss it with. 6 MR. BROOK: I have no further 7 questions. 8 MR. CALIHAN: I have no questions at 9 this time. 10 MR. RAMSEY: We are done. 11 THE VIDEOGRAPHER: This marks the end 12 of media unit number six in the videotaped 13 deposition of Lester Eber. We are going off 14 the record. The time is 5:08. 15 (Time Noted: 5:08 p.m.) 16 17 18 LESTER EBER 19 20 Subscribed and sworn to before me 21 this day of , 2019. 22 23 24 (Notary Public) My Commission Expires: 25</p>

Page 298	Page 300
1	1
2 C E R T I F I C A T E	2 Consulting Agreement Bates numbers EB
3 STATE OF NEW YORK)	3 00000702 through 711
4 : ss.	4 Exhibit 28, a series of W-2s that were 64
5 COUNTY OF NEW YORK)	5 produced by the parties in discovery
6 I, LYNNE D. METZ, a Shorthand Reporter	6 Bates numbers EB 00021420 through 428
7 and a Notary Public within and for the State of	7 Exhibit 29, a series of letters that 71
8 New York, do hereby certify that the foregoing	8 appears to be written on Lester Eber's
9 deposition of LESTER EBER was taken before me on	9 letterhead bearing Bates stamps EB 695
10 the 24th day of January, 2019;	10 through 701
11 That the said witness was duly sworn	11 Exhibit 30, a document entitled Amended 99
12 before the commencement of his testimony; that the	12 and Restated Promissory Note bearing
13 said testimony was taken stenographically by me	13 Bates numbers EB 00031310 through 311
14 and then transcribed.	14 Exhibit 31, a copy of two printouts 110
15 I further certify that I am not	15 made on October 1, 2016 from the
16 related by blood or marriage to any of the parties	16 Connecticut Department of State
17 to this action or interested directly or	17 concerning the business Alexbay LLC
18 indirectly in the matter in controversy; nor am I	18 Exhibit 32, a letter and some 128
19 in the employ of any of the counsel in this	19 attachments that are dated July 12,
20 action.	20 2017 from Rita Nischal of Canandaigua
21 IN WITNESS WHEREOF, I have hereunto	21 National Bank and Trust to Lester Eber
22 set my hand this 8th day of February, 2019.	22 Exhibit 33, a order in the Surrogates 128
23	23 Court of The State of New York in
24	24 Monroe County dated June 1, 2017 signed
25	25 by Surrogate Judge John M. Owens
Page 299	Page 301
1	1
2 January 24, 2019	2 Exhibit 34, a letter and attachments 132
3	3 that was produced yesterday by
4 I N D E X	4 Canandaigua National Bank Bates stamped
5 WITNESS EXAMINATION BY PAGE	5 CNB-PL 0010 through 12
6 LESTER EBER MR. BROOK 7	6 Exhibit 35, a e-mail and attachment 137
7	7 dated October 31, 2018 sent by Paul
8 ----- INFORMATION REQUESTS -----	8 Keneally with multiple recipients
9 DIRECTIONS (DI): 141, 161	9 CNB-PL 0001 to 2
10 INSERT: None	10 Exhibit 36, a printout of a table with 141
11 RULINGS (RL): None	11 some notes entitled Residuary TUW Allen
12 REQUESTS (RQ): 75, 181	12 Eber Proposed Distribution of
13 CERTIFIED (CE): None	13 Securities
14 MOTIONS (MO): None	14 Exhibit 37, a e-mail dated September 141
15	15, 2017 sent by Jim Vazzana to R.
16 E X H I B I T S	16 Nischal at CNB, Canandaigua National
17 Plaintiffs' Exhibits For ID	17 Bank, with yourself as one of the
18 Exhibit 25, a document entitled 15	18 people copied on it Bates stamped
19 Unanimous Written Consent of the Board	19 CNB-PL 0005
20 of Directors of Eber Brothers Wine and	20 Exhibit 38, a letter dated October 11, 144
21 Liquor Corporation Bates numbered EB	21 2017 on letterhead for Woods Oviatt
22 00001338 through 1340	22 Gilman LLP addressed to Jim Vazzana and
23 Exhibit 26, an article found online on 37	23 me
24 casshilldevelopment.com	24 Exhibit 39, a four-page letter dated 148
25 Exhibit 27, a document entitled 61	25 November 5, 2018 by Paul Keneally

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<p style="text-align: right;">Page 302</p> <p>1 2 addressed to Magistrate Judge Katherine 3 Parker 4 Exhibit 40, a e-mail dated June 2, 2017 151 5 from Jim Vazzana to Lorisa LaRocca 6 Bates number CNB-PL 0022 7 Exhibit 41, an e-mail dated August 18, 151 8 2017 from Jim Vazzana to Lorisa LaRocca 9 Exhibit 42, a copy of a letter dated 155 10 October 10, 2018 from Audrey Hays to 11 Wendy Eber and Lester Eber 12 Exhibit 43, a series of documents that 167 13 were produced together Bates range EB 14 00001166 through 1173 15 Exhibit 44, a copy of a summons and 191 16 complaint dated February 21, 2012 17 bearing Bates number KSH 00070 through 18 83 19 Exhibit 45, a document bearing the 209 20 caption of Alexbay versus Eber Brothers 21 and it states it is the affidavit of 22 Lester Eber bearing Bates numbers EB 23 00001059 through 1063 24 Exhibit 46, Affidavit of Lester Eber 218 25 bearing Bates numbers EB 00017525</p>	<p style="text-align: right;">Page 304</p> <p>1 ERRATA SHEET 2 VERITEXT LEGAL SOLUTIONS 3 330 OLD COUNTRY ROAD 4 MINEOLA, NEW YORK 11501 5 516-608-2400 6 NAME OF CASE: Kleeberg, et al v. Eber, et al 7 NAME OF DEONENT: Lester Eber 8 DATE OF DEPOSITION: January 24, 2019 9 PAGE LINE(S) CHANGE REASON 10 11 12 13 14 15 16 17 18 19 20 21 _____ 22 Lester Eber 23 SUBSCRIBED AND SWORN TO BEFORE ME 24 THIS ____ DAY OF _____, 20__. 25 (NOTARY PUBLIC) _____ MY COMMISSION EXPIRES:</p>
<p style="text-align: right;">Page 303</p> <p>1 2 through 544 3 Exhibit 47, a two-page letter on the 253 4 letterhead for Elliot W. Gumaer, Jr. 5 Dated January 2, 2001 Bates stamped 6 January 8, 2001 and Bates number EB 7 00001556 to 57 8 Exhibit 48, an e-mail from Mike Gumaer 257 9 to Wendy Eber and Lester Eber dated 10 October 29, 2013 bearing Bates number 11 GUM 000023 12 Exhibit 49, a letter on Eber Brothers 264 13 Wine and Liquor Corp. Letterhead signed 14 by Lester Eber Bates number KSH 00004 15 dated April 2, 2010 16 Exhibit 50, a chain of two e-mails 280 17 possible another e-mail that appears to 18 have been redacted Bates number EB 19 00031202 20 Exhibit 51, an e-mail from Mike Gumaer 286 21 to Lester Eber copying Wendy Eber dated 22 December 1, 2013 bearing Bates numbers 23 EB 00031106 24 25 ***Exhibits retained by counsel.***</p>	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No.: 16-cv-951 (LAK)

DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS.

Plaintiff,

-against-

LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,
LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a
CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT
W. GUMAER, JR.; EBER BROS. & CO., INC., EBER
BROTHERS WINE AND LIQUOR CORPORATION;
BROS. WINE AND LIQUOR METRO, INC.,
EBER-CONNECTICUT, LLC; and WENDY EBER.

Defendants.

1250 Broadway

New York, New York 10001

June 27, 2019

1 : 35 p.m.

CONTINUED VIDEOTAPED DEPOSITION OF LESTER EBER,
held at the above-mentioned time and place before
ANNMARIE OAKLEY, a Notary Public of the State of
New York.

<p>1 2 3 APPEARANCES 4 5 BROOK & ASSOCIATES PLLC Attorneys for Plaintiffs 6 100 Church Street, 8th Floor New York, New York 10007 7 8 BY: BRIAN BROOK, ESQ. 9 10 UNDERBERG & KESSLER LLP Attorneys for Defendants 11 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER BROTHERS & CO., INC; EBER BROS. WINE AND LIQUOR 12 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER 13 50 Fountain Plaza Buffalo, New York 14202 14 BY: COLIN RAMSEY, ESQ. 15 16 CALIHAN LAW PLLC Attorneys for Defendant 17 THE ESTATE OF ELLIOT W. GUMAER 16 Main Street 18 Rochester, New York 14614 19 BY: ROBERT B. CALIHAN, ESQ. 20 21 Also present: Phil Glauberson, videographer 22 Wendy Eber, telephonically. 23 24 25</p>	<p>Page 306</p> <p>1 L. EBER 2 attending remotely will now state their appearances 3 and affiliations for the record. 4 MR. BROOK: Brian Brook, Brook & 5 Associates, PLLC for the plaintiffs. 6 MR. RAMSEY: Colin Ramsey, Underberg & 7 Kessler for the Eber defendants. 8 MR. CALIHAN: Robert Calihan of Calihan 9 Law on behalf of the estate of Elliot Gumaer. 10 VIDEOGRAPHER: Will the court reporter, 11 please, swear in the witness. 12 MR. RAMSEY: Wendy Eber is on the phone. 13 L E S T E R E B E R, having first been duly sworn 14 or affirmed by a Notary Public of the State of 15 New York, was examined and testified as follows: 16 EXAMINATION BY MR. BROOK: 17 Q Would you state your name for the record, 18 please. 19 A Lester Eber. 20 Q Would you state your address for the 21 record, please. 22 A 95 Allens Creek Road, Rochester, New York 23 14618. 24 Q Good afternoon, Lester. Good to see you 25 again. I already deposed you one previous day. Do</p>
<p>1 L. EBER 2 VIDEOGRAPHER: Good afternoon. We are 3 going on the record at 1:39 p.m. on June 27, 4 2019. Please, note that the microphones are 5 sensitive and may pick up whispering, private 6 conversations and cellular interference. 7 Please, turn off all cellphones and place them 8 away from the microphones as they can interfere 9 with the deposition audio. Audio and video 10 recording will continue to take place unless 11 all parties agree to go off the record. 12 This is media unit one, day two of the 13 video recorded deposition of Lester Eber in the 14 matter of Daniel Kleeberg et al. versus Lester Eber 15 et al. filed in the United States District Court 16 Southern District of New York, Civil Action number 17 16-cv-951 LAK. This deposition is being held at 18 Veritext, located at 1250 Broadway New York, New 19 York. My name is Phil Glauberson from the firm 20 Veritext and I am the videographer. The court 21 reporter is AnnMarie Oakley from the firm Veritext. 22 I am not authorized to administer an oath. 23 I am not related to any party in this action nor am 24 I financially interested in the outcome. Counsel 25 and all present in the room, please, and everyone</p>	<p>Page 307</p> <p>1 L. EBER 2 you need me to go over any of the instructions or 3 rules for how this works? 4 A Your choice. I -- 5 MR. RAMSEY: Did you need him to? 6 THE WITNESS: I -- you know I -- 7 MR. RAMSEY: I think we can skip those. 8 Q Do you have any questions about how this 9 works today? 10 A Not yet. 11 Q Just to refresh at least one thing, if you 12 don't understand something in my question it's 13 important that you let me know because if you answer 14 my question I'm going to assume that you understood 15 it. Okay? 16 A Okay. 17 Q And as I think you just recalled, it's 18 also important to give verbal answer not just nods 19 or uh-uh. 20 A Yes. 21 Q How are you feeling today? 22 A So far okay. 23 Q Is there any reason why you would not be 24 able to testify fully and truthfully today, such as 25 being under the influence of medication or undue</p>

2 (Pages 306 - 309)

<p style="text-align: right;">Page 330</p> <p>1 L. EBER 2 A Oh, in the back. Yes. It comes from him, 3 yes. He's the one who handled it. 4 Q So if you think you talked to him why 5 didn't he send this to you? 6 MR. RAMSEY: Form. 7 A I'm not the administrative person. I'm 8 not the secretary there. 9 Q Where are you referring to? 10 A There weren't any employees there. It was 11 just -- Wendy was the only one that could -- that 12 was there. We had no secretaries, no people to do 13 anything. 14 Q I'm asking what company you're referring 15 to. 16 A Well, with anything that would have 17 involved getting a security for the loans. 18 Q So you can't say which entity you're 19 referring to that Wendy was doing the secretarial 20 work for? 21 MR. RAMSEY: Form. 22 A I could not -- I would not remember that 23 because there were so many there and I wouldn't want 24 to pin it down to one and say it wasn't another one. 25 I can't. To the best of my recollection I can't</p>	<p style="text-align: right;">Page 332</p> <p>1 L. EBER 2 the last sentence of the first paragraph there is 3 referring to a conversation between the author, 4 Michael Beamer, and Glenn Sturm and it says, quote, 5 "Glenn told me that he wanted to protect the loans 6 and guarantee that the Article 9 transfer was 7 somehow upset in the future." end quote. Do you see 8 that? 9 A Yeah, Glenn told me. Yes. 10 Q Do you recall why Glenn Sturm was 11 concerned about the Article 9 transfer being upset 12 in the future? 13 MR. RAMSEY: Form. 14 A I think Glenn was a very intelligent man. 15 We relied on him for his legal advice and he just 16 wanted to protect us to the best of his ability or 17 protect me. 18 Q Did you discuss with him the possibility 19 that the Article 9 transfer might be upset in the 20 future? 21 A No. 22 Q Did you discuss that with Wendy. 23 A I don't remember any kind of discussion. 24 The whole discussion was to protect the loans that I 25 had given the company.</p>
<p style="text-align: right;">Page 331</p> <p>1 L. EBER 2 give you a definite one that she was working for. 3 Q Now, this memo is also sent to Glenn 4 Sturm. We discussed him before but was Glenn Sturm 5 ever your personal attorney? 6 A Not my personal attorney, no. Yeah, well 7 he did some work for me personally but he did 8 corporate work for us to. 9 Q What work did he do for you personally? 10 A Well, I think after I would ask him 11 questions. He was a lawyer and he would give me 12 legal advice. 13 Q Did you ever pay him for that advice? 14 A I personally don't remember paying him. 15 Q Who paid Glenn Sturm for his services? 16 A I don't remember who. 17 Q Beside yourself individually -- well, 18 let's step back. Can you give any specific examples 19 of a transaction or document where Glenn Sturm gave 20 you advice as your personal lawyer? 21 A I don't remember. 22 Q Did you ever sign an engagement agreement 23 with Glenn Sturm? 24 A I don't remember doing that. 25 Q Did you ever -- just looking at this memo,</p>	<p style="text-align: right;">Page 333</p> <p>1 L. EBER 2 Q And as you sit here today do you recall 3 any loans that you had given in to any Eber Brothers 4 company that had not be assigned to Alex Bay by you 5 earlier in the year in 2012? 6 A I don't remember. 7 Q When is the last time that you spoke to 8 Glenn Sturm? 9 A Could be a year or two or a year ago or 10 more. 11 Q Did you discuss this case with him? 12 A The man has been very sick. I have not 13 talked to him. 14 Q He's had cancer; correct? Is that yes? 15 A Yes. 16 Q But he's had cancer since you've known 17 him; correct? 18 A Yes. 19 Q Is it your understanding that the cancer 20 has gotten worse recently? 21 A Yes. 22 Q Do you know, did he move out of his home? 23 A I don't know. 24 Q Was Glenn Sturm the first person to 25 suggest to you that you should secure the loans that</p>

<p style="text-align: right;">Page 334</p> <p>1 L. EBER 2 you made to the company? 3 MR. RAMSEY: Form. 4 A I don't remember but be did say that to 5 me. 6 Q Having had the chance to review the 7 document that you did does that refresh your 8 recollection that it was Glenn Sturm's law firm, 9 Nelson Mullins, that drafted the original security 10 agreement that you signed in 2010? 11 A It could have been. You have it there and 12 I read it. I believe that they did it. 13 Q And you previously testified that you 14 thought Pat Dalton had drafted the security 15 agreement so you would now conceive that was an 16 incorrect recollection? 17 MR. RAMSEY: Form. 18 A I don't remember saying that about Pat 19 Dalton. You might have some records that show that 20 but it could have been. Dalton could have been the 21 first one too, I mean before Glenn -- 22 MR. RAMSEY: Just what you recollect. 23 Don't assume. 24 MR. BROOK: This one marked as Plaintiff's 25 Exhibit 99 bears Bates numbers EB714 through</p>	<p style="text-align: right;">Page 336</p> <p>1 L. EBER 2 Q Why did you want Mike Gumaer to look over 3 these documents and give you comments? 4 A After talking to Mike as my counsel that I 5 thought was the prudent thing to do. 6 Q So as of March 2010 was it your belief 7 that Mike Gumaer was still representing you as your 8 personal attorney? 9 A Yes. 10 Q At what point did Mike Gumaer stop being 11 your personal attorney? 12 A He didn't. 13 MR. CALIHAN: He's not representing him 14 today. 15 Q When you met is that -- it is your belief 16 that he continued to be your personal attorney until 17 the day he died; is that right? 18 A Yes. 19 Q When did he first become your personal 20 attorney? 21 A 1970, July of 1970. 22 Q At that time did you have any sort of a 23 documentation of that representation? 24 A No. 25 Q Do you recall any documentation of Mike</p>
<p style="text-align: right;">Page 335</p> <p>1 L. EBER 2 728. It's an email and one of the attachments. 3 The other attachments do not appear to have 4 been produced. 5 (EB714 to EB728 was marked as 6 Plaintiff's Exhibit 99 for 7 identification.) 8 Q Do you recognize this document? 9 A This was sent to me care of my secretary. 10 Q So copied to you? 11 A Copied to me, yeah. 12 Q And it was being sent to Mike Gumaer? 13 A Yeah. Yes. 14 Q And the attachment that's there that is a 15 draft of the 2010 security agreement that was not 16 yet signed; correct? 17 A That is correct. 18 Q Why were you -- in the email sent by your 19 assistant says, "I have attached some documents that 20 Mr. Eber would like you to look over and is asking 21 for your comments. He's is mailing each of the 22 three documents plus a letter all attached to each, 23 Sally Kleeberg and Audrey Hays. Also attached is a 24 personal letter to Sally." Do you see that? 25 A Yes.</p>	<p style="text-align: right;">Page 337</p> <p>1 L. EBER 2 Gumaer's agreement to be your personal attorney? 3 A No. 4 Q You don't recall the January 2001 letter 5 that you signed that we looked at last time? 6 A If that's what it was, but you asked me 7 when he started as my personal attorney, it's when 8 my father passed away in July of 1970. 9 Q Did you ever pay Mike Gumaer for his 10 services as your personal attorney yourself? 11 A Not personally, no. 12 Q How was he's compensated for those 13 services? 14 A The company usually paid him. 15 Q In what capacity was he being paid? 16 MR. RAMSEY: Form. 17 A As counsel to the company, advising them 18 on legal questions. 19 Q Was he also paid after the year 2000 when 20 he resigned from Nixon Peabody through director 21 fees? 22 A Yes. 23 Q So that director fee encompassed his legal 24 advice for you; is that correct? 25 MR. CALIHAN: Objection to form.</p>

9 (Pages 334 - 337)

<p style="text-align: right;">Page 358</p> <p>1 L. EBER</p> <p>2 Q And do you see -- so this email is being 3 sent to Mike for his signature or March 12, 2012, 4 and the consent form states that it's executed as of 5 the blank day of February 2012. Do you see that, 6 comparing the last and the first page?</p> <p>7 A Yes.</p> <p>8 Q Do you know why the consent form was being 9 dated in February when it wasn't being sign or sent 10 to Mike Gumaer for signature until sometime in 11 March?</p> <p>12 A No.</p> <p>13 Q Can you think of any reason why it would 14 be dated in February?</p> <p>15 MR. RAMSEY: Form.</p> <p>16 A No.</p> <p>17 Q Looking at the bottom of the first page, 18 it's an email from Wendy to someone named Melinda 19 Parker copying you stating, "Melinda, Can you, 20 please, substitute my name for Elliot Gumaer as 21 president since I will be replacing Lester as 22 president." Do you see?</p> <p>23 A Yes.</p> <p>24 Q Does that fresh your recollection as when 25 the decision was made for Wendy to be your</p>	<p style="text-align: right;">Page 360</p> <p>1 L. EBER</p> <p>2 needed to be three directors of the company, Eber 3 Brothers Wine & Liquor Corp.?</p> <p>4 A I never had that discussion.</p> <p>5 Q Did you discuss with anyone besides Wendy 6 and Mike Gumaer about having that third person serve 7 as director Eber Brothers Wine & Liquor?</p> <p>8 A I don't remember.</p> <p>9 Q Do you remember this document at all?</p> <p>10 MR. RAMSEY: The last page?</p> <p>11 MR. BROOK: The last page.</p> <p>12 A You know its been since, over nine years.</p> <p>13 I don't remember it but it's here, so it's here.</p> <p>14 Q Do you see the first resolution there says 15 that the resignation is accepted and approved 16 effective February 1, 2012. Do you see that?</p> <p>17 A Yes.</p> <p>18 Q How was that date selected?</p> <p>19 A I don't remember.</p> <p>20 Q This is Exhibit 104, Bates EB31202. It's 21 a chain of emails between you, Wendy and Mike 22 Gumaer. Do you see that?</p> <p>23 (EB31202 was marked as 24 Plaintiff's Exhibit 104 for 25 identification.)</p>
<p style="text-align: right;">Page 359</p> <p>1 L. EBER</p> <p>2 replacement?</p> <p>3 A No.</p> <p>4 Q Did you have a say in who replaced you as 5 president of Eber Brothers Wine and Liquor Corp.?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 A I don't remember.</p> <p>8 Q Did you resign as just president or also 9 as director of Eber Brothers Wine and Liquor Corp.?</p> <p>10 A I think it could have been just president. 11 I don't remember if it was both.</p> <p>12 Q So if you look at the last page of this 13 document it says that you're resigning as director 14 and president. Do you see that?</p> <p>15 A Yes.</p> <p>16 Q And is it your recollection that that was 17 changed prior to being signed so that you only 18 resigned as president?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A I resigned as both of them. That's what 21 it says. That's what I did.</p> <p>22 Q When did you become a director of Eber 23 Brothers Wine and Liquor Corp. again?</p> <p>24 A I don't remember the exact date.</p> <p>25 Q Did you have an understanding that there</p>	<p style="text-align: right;">Page 361</p> <p>1 L. EBER</p> <p>2 A Yes.</p> <p>3 Q And these are on January 10, 2013, subject 4 Alan Eber trust.</p> <p>5 A Yes.</p> <p>6 Q I want to look at the second email first 7 the one from Wendy where she is referring to the 8 December 2012 statement for the Alan Eber trust 9 deposition by Canandaigua Bank and it says, quote, 10 "It values Eber Brothers stock at approximately 11 \$655,000. It should be zero per our conversation in 12 January with Rick Hawks." Do you see that?</p> <p>13 A Yes.</p> <p>14 Q And in your email and response you said, 15 "Mike, I think you and I should get Rick on the 16 phone to discuss this with him. This was supposed 17 to have been done." Do you see?</p> <p>18 A Yes.</p> <p>19 Q What did you mean by that?</p> <p>20 A That it should have been valued at zero. 21 That was a mistake for 655,000.</p> <p>22 Q Why was it that you believe the stock 23 should be valued at zero?</p> <p>24 A Because it had no assets. There wasn't 25 any business.</p>

15 (Pages 358 - 361)

<p style="text-align: right;">Page 362</p> <p>1 L. EBER 2 Q And why was that? 3 A The company was -- had been consolidated 4 and out of business. 5 Q Are you referring to the -- 6 A Eber Brothers. 7 Q Eber Metro had been transferred to Alex 8 Bay? 9 MR. RAMSEY: Form. 10 A I'm not referring to that. I'm referring, 11 there were no assets in the company so there was 12 nothing in Eber Brothers. 13 Q What was the last asset that Eber Brothers 14 had that you can recall? 15 A It probably was Eber Connecticut. 16 Q Through Eber Metro; correct? 17 A Yes. 18 Q Is this the first -- January 2013, is that 19 the first time you recall having a discussion with 20 anyone about the valuation of Eber Brothers stock on 21 the trust statements being inaccurate? 22 A I don't remember. 23 Q So prior to the transfer of Eber 24 Connecticut out of Eber Brothers, was it your belief 25 that the value of Eber Brothers stock was</p>	<p style="text-align: right;">Page 364</p> <p>1 L. EBER 2 Brothers Wine & Liquor Corp. to Canandaigua National 3 Bank? 4 A Yes, we had. 5 Q When did you do that? 6 A I don't remember. 7 Q Had you told Canandaigua National Bank 8 that you thought that the Eber Brothers stock 9 valuation was questionable in light of the debts? 10 MR. RAMSEY: Form. 11 A I would have but I wasn't talking to them 12 but I would have said that. 13 Q Why did you say you would have said that? 14 A Because it's the facts. 15 Q But you don't remember doing it; correct? 16 MR. RAMSEY: Form. 17 A You can say whatever you wants I -- 18 Q Well, I'm asking you, you don't remember 19 doing that, do you? 20 A I don't remember not doing it. I don't 21 remember. 22 Q Okay. So just to we're clear, you don't 23 remember ever telling Canandaigua National Bank 24 about the debts of Eber Brothers Wine & Liquor Corp. 25 possibly affecting the value of the Eber Brothers &</p>
<p style="text-align: right;">Page 363</p> <p>1 L. EBER 2 approximately \$655,000? 3 A I don't remember. 4 Q Did you think that the Eber Brothers stock 5 had any value before Eber Connecticut was transfer 6 to Alex Bay? 7 MR. RAMSEY: Form. 8 A I think with all the debts I think it was 9 questionable whether there was any value to it 10 because of the monies that were owed. 11 Q Which debts are you referring to? 12 A Well, the debts of Eber Brothers, the 13 Teamsters Pension Plan, the public PBGC and 14 Vendersen, it's a real estate company. 15 Q And also there was debt to Harris Beach; 16 correct? 17 A Yes. 18 Q Any other debts? 19 A There were others, I can't remember them 20 all. There were a lot of them. 21 Q And you're referring to debts that were 22 owed by Eber Brothers Wine & Liquor Corp. or is it 23 another entity? 24 A I think Eber Brothers Wine & Liquor. 25 Q Had you disclosed the debts of Eber</p>	<p style="text-align: right;">Page 365</p> <p>1 L. EBER 2 Co. stock -- 3 MR. RAMSEY: Form. 4 A You're putting word into my mouth. You're 5 making up words that I did not say. I said I don't 6 remember. 7 MR. RAMSEY: I think we established what 8 didn't happen so move on. 9 Q Do you recall ever having -- when is the 10 first time you recall trying to having a formal 11 valuation done of Eber Brothers Wine & Liquor Corp. 12 or Eber Brothers & Co. Inc.? 13 A I don't remember. 14 Q How did Canandaigua National Bank, how did 15 the trust statements that it was issuing come to 16 have the number \$655,000 for the Eber Brothers & Co. 17 stock? 18 A I don't know. 19 Q Would you have you been the source of that 20 information? 21 MR. RAMSEY: Form. 22 A No. 23 Q Why did you say that? 24 A Because I don't know where it came from. 25 Q I'm asking you, could it have been from</p>

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<p style="text-align: right;">Page 394</p> <p>1 L. EBER 2 MR. RAMSEY: The question is: Do you have 3 any reason to believe that Wendy saw a copy of 4 your will. 5 A No. 6 Q Is David Eber involved in the wine and 7 liquor business? 8 A Yes. 9 Q How so? 10 A He's an importer. 11 Q Who does he work for? 12 A Himself. 13 Q Has he worked for Southern Wine & Spirits 14 at any point in time? 15 A Yes. 16 Q When was that? 17 A After we went out of business. 18 Q How long did he work for Southern Wine & 19 Spirits? 20 A I don't remember. 21 Q Did you help him get that job? 22 A I believe so. I don't remember. I think 23 he got it himself. He applied there and they hired 24 him. 25 Q Did he ever work from Eber Brothers?</p>	<p style="text-align: right;">Page 396</p> <p>1 L. EBER 2 A No. 3 Q Were the bylaws every amended after you 4 became involved in the business? 5 A I don't know. 6 Q Do you have a copy of the bylaws? 7 A No. 8 Q Where was a copy of the bylaws maintained? 9 A Corporate offices. 10 Q Did you ever give a copy of the bylaws to 11 Canandaigua National Bank? 12 A I did not. 13 Q Did you ever discuss the bylaws with 14 anyone from Canandaigua National Bank? 15 A No. 16 Q To your knowledge did anyone else from 17 Eber Brothers do so? 18 A I do not know. 19 Q I want to draw your attention to page 11 20 of this Exhibit 108, Article 12, transfer 21 restriction. Do you see that? 22 A Yes. 23 Q Are you familiar with this provision or of 24 the bylaws? 25 A I don't remember it.</p>
<p style="text-align: right;">Page 395</p> <p>1 L. EBER 2 A Yes. 3 Q What was his position? 4 A He had a variety of positions. He had 5 management positions in different areas. 6 Q Are you familiar with the bylaws of Eber 7 Brothers Wine & Liquor Corp.? 8 A I have read them. 9 MR. BROOK: This is marked Exhibit 108, it 10 was a document that was produced as the bylaws 11 of Eber Brothers Wine & Liquor Corporation. 12 The Bates number is EB22533 through 544. 13 (EB22533 to EB22544 was marked 14 as Plaintiff's Exhibit 108 for 15 identification.) 16 Q Do you recognize this? 17 A I haven't seen it in years. 18 Q When is the last time that you recall 19 seeing the bylaws of Eber Brothers Wine & Liquor 20 Corp.? 21 A I don't remember. 22 Q Who drafted the bylaws? 23 A I do not know. 24 Q Were you involved in the drafting of the 25 bylaws?</p>	<p style="text-align: right;">Page 397</p> <p>1 L. EBER 2 Q Do you recall ever discussing this 3 provision of the bylaws with anyone else? 4 A I don't remember. 5 Q What is your understanding of the purpose 6 of Article 12 of the bylaws? 7 MR. RAMSEY: Form. 8 A I believe it's to transfer -- how the 9 stock would be transferred. That's what it says. 10 Q Why was this put into the bylaws? 11 A I don't know. 12 Q To your knowledge has this provision of 13 the bylaws ever been enforced? 14 A I don't remember. 15 Q We're looking at the bylaws of Eber 16 Brothers Wine & Liquor Corp. have you seen the 17 bylaws of Eber Brothers & Co. Inc.? 18 A Possibly I have seen them over the years. 19 Q Do you recall ever discussing those with 20 anyone from CNB? 21 A No. 22 Q Do you recall giving a copy of this Eber 23 Brothers & Co. Inc. bylaws to CNB? 24 A No. 25 Q Do you know whether the Eber Brothers &</p>

24 (Pages 394 - 397)

<p style="text-align: right;">Page 434</p> <p>1 L. EBER 2 MR. RAMSEY: I'm reading this. I'm going 3 to stipulate to withdraw. That doesn't make 4 sense. I will stipulate to withdraw that one. 5 MR. BROOK: He did sign this thing. 6 MR. RAMSEY: I understand. Whatever the 7 change was, let's not go back in time but right 8 now if it's going to short circuit we can agree 9 that it didn't clarify it very well. 10 Q Did you review this document, Exhibit 110 11 and check it against the transcript for accuracy 12 before you signed it? 13 A Yes, I did go with it with them but I 14 don't remember. I just can't remember all those 15 details. 16 MR. RAMSEY: All right you answered the 17 question. 18 Q Was this another instance where you were 19 given a document to sign by a lawyer and you signed 20 it without reading it carefully? 21 MR. RAMSEY: Form. 22 A No. 23 Q Do you recall any other instance when you 24 signed a document given to you by a lawyer without 25 reading it carefully besides the Affidavit that was</p>	<p style="text-align: right;">Page 436</p> <p>1 L. EBER 2 Brothers Wine & Liquor Corp. So we're talking 3 roughly December, January, December 2011, 4 January 2012. Are you with me? That's what we were 5 talking about? 6 A Yes. 7 Q My question was: "Why did you not -- and 8 this is a typo. "Why did you not extend the 9 maturity date of your line of credit note rather 10 than begin foreclosure proceedings?" and your new 11 answer to that is, "I consulted with my lawyers and 12 then decided to do so." So as before I would like 13 an answer to my actual question which is: Why 14 didn't you extend the maturity date on the line of 15 credit here? 16 A I did consult with my lawyers but I don't 17 remember why I didn't do it. 18 Q Isn't it true the reason you didn't 19 extended the maturity date on the line of credit 20 note was because you wanted to take control of the 21 company away from them? 22 MR. RAMSEY: Form. 23 A I don't remember why I didn't extend it. 24 Q Did you want to take personal control of 25 Eber Brothers operating assets away from the trust?</p>
<p style="text-align: right;">Page 435</p> <p>1 L. EBER 2 prepare for you by Jerry? 3 MR. RAMSEY: Form. 4 A That one was an exception but I don't 5 remember any others. 6 Q So, for example, with respect to the 7 answer, even though you didn't sign that document 8 you knew if was important to make sure that that 9 answer was correct and accurate? 10 A Yes. 11 Q And you made sure it was so; correct? 12 MR. RAMSEY: Form. He's not submitting 13 the answer. 14 Q All right. I want to turn now to the next 15 change that you made, page 241 of the last 16 transcript. I asked you -- I will wait for you to 17 get there. 18 A 241? 19 Q 241. 20 A This goes up to 300. 21 Q Bottom right, are you there? 22 A Yes. 23 Q So at that point I'm discussing your 24 decision to foreclose on the debt that was owed to 25 you by Eber Metro after it assumed the debt of Eber</p>	<p style="text-align: right;">Page 437</p> <p>1 L. EBER 2 MR. RAMSEY: Form. 3 A I wanted to stop the company going into 4 liquidation, and that's what would have happened if 5 I had not given the money and support to the 6 company, and there wouldn't be a case even. 7 Q So is it your testimony that if you had 8 extended the maturity date on your line of credit 9 note that would have caused the company to go into 10 liquidation? 11 MR. RAMSEY: Form. 12 A I don't know. I made the decision at the 13 time. I don't remember why but my whole mission was 14 to keep the company out of liquidation, to keep it 15 alive. 16 Q Did you want to prevent Eber Connecticut 17 from being run for the benefit of Eber Brothers 18 pension plan? 19 MR. RAMSEY: Form. 20 A I supported -- I gave up my pension of 1.5 21 million to the PBGC to erase that benefit, to erase 22 that debt and I was not personally liable to do it. 23 Q They did sue Eber Connecticut before you 24 did that; correct? 25 A That is correct.</p>

<p style="text-align: right;">Page 438</p> <p>1 L. EBER 2 Q So you said that you consulted with 3 lawyers and then you acted, which lawyers did you 4 consult with about whether to extend the line of 5 credit note? 6 A I don't remember. 7 Q So how did you know that you consulted 8 with lawyers? 9 MR. RAMSEY: Form. 10 A Because I would not sign a document unless 11 I talked to legal counsel. 12 Q So that's your standard practice; correct? 13 A Usually, there could be exceptions, but 14 usually. 15 Q So do you know whether that was legal 16 counsel for you personally or was that corporate 17 counsel? 18 A I don't remember. 19 Q Did you ever discuss whether to extend the 20 line of credit note with Mike Gumaer? 21 A I don't remember. 22 Q You're aware that Glenn Sturm ended up 23 providing promissory note to Eber Metro; correct? 24 A Yes. 25 Q The maturity date on that was extended</p>	<p style="text-align: right;">Page 440</p> <p>1 L. EBER 2 MR. RAMSEY: Form. 3 A CNB was very well protected by my personal 4 guarantee and the 500,000 and 120,000 in stock that 5 I left with them. I wasn't protected on anything. 6 Q Well, you were in control of the company 7 weren't you? 8 A The money I lent them, there was no 9 security. I had no protection on it. As a creditor 10 I would not have had any protection. 11 Q Well, for several years you said that you 12 gave money to Eber Brothers without having any 13 security on it; right? 14 A Yes. 15 Q Why did you suddenly change your mind? 16 MR. RAMSEY: Form. 17 A On advice of counsel that's what I did. 18 Q And which counsel was that? 19 A I don't remember. 20 Q It was Glenn Sturm; correct? 21 A It could have been. 22 Q And Glenn Sturm then prepared a security 23 agreement for you to sign in March 2010; correct? 24 A If there's one that I signed he did. 25 Q What did Eber Brothers get out of giving</p>
<p style="text-align: right;">Page 439</p> <p>1 L. EBER 2 twice; correct? 3 A I don't remember that. 4 Q And Eber Metro never tried to collect on 5 that, did it? 6 A I really don't know about it. I shouldn't 7 say. I do not remember it. 8 Q Is it fair to say that with respect to 9 CNB, one of the things that you and Wendy tried to 10 do, for several years, was to get them to continue 11 to extend their credit that they had given to you? 12 A Yes. 13 Q Why was an extension of credit a good 14 thing for the company? 15 A Businesses need credit to buy product and 16 run, to make a payroll. 17 Q So you didn't want them to foreclose on 18 the credit? 19 A That is correct. 20 Q Foreclose is a bad thing; right? 21 MR. RAMSEY: Form. 22 A It would have liquidated the company. 23 Q So foreclosure on credit is a bad thing 24 when CNB does it. Why was foreclosure on a line of 25 credit when you did it a bad thing?</p>	<p style="text-align: right;">Page 441</p> <p>1 L. EBER 2 you security at that time? 3 MR. RAMSEY: Form. 4 Q Was there any benefit to Eber Brothers for 5 signing that security agreement with you then? 6 A Benefit to Eber Brothers? Eber Brothers 7 kept -- I kept my loans and monies and more than I 8 had given them, kept the company alive. 9 Q But you already agreed to loan them money; 10 correct? 11 A I agreed to loan them money, yes. 12 Q So if you already agreed to loan them 13 money what new did the company get by agreeing to 14 secure your loan? 15 A I wouldn't of foreclosed. I didn't 16 foreclose on them at that time. 17 Q So you believe that you could have 18 foreclosed on the loan in or around February or 19 March of 2010? 20 MR. RAMSEY: Form. 21 A I don't have the dates but I could have 22 foreclosed on the loans. 23 Q Even though you don't have the dates, at 24 the time that you sign the security agreement you 25 believed that you could have foreclosed on the loan;</p>

<p style="text-align: right;">Page 442</p> <p>1 L. EBER 2 is that right? 3 MR. RAMSEY: Form. 4 A I think the security agreement gave me 5 preference as a creditor, gave me comfort, as any 6 good businessman would do. 7 Q Was there any benefit to the Eber 8 Brothers -- I'm sorry. Withdrawn. Was there any 9 benefit to Eber Brothers Wine & Liquor Corp. as a 10 result of you foreclosing on the loan and taking 11 over Eber Metro? 12 MR. RAMSEY: Form. 13 A Benefit? 14 Q Yes. 15 A Well, I think it's how you describe a 16 benefit. 17 Q How do you describe benefit? 18 MR. RAMSEY: Form. 19 A Keeping the entity alive. 20 Q Is taking away the only remaining asset to 21 the company beneficial to the company, in your 22 definition? 23 MR. RAMSEY: Form. 24 A I did what any reasonable creditor would 25 do to protect my investment. The money that I</p>	<p style="text-align: right;">Page 444</p> <p>1 L. EBER 2 PBGC took that away from me. 3 MR. RAMSEY: Brian, I know we covered 4 this. 5 THE WITNESS: He goes over and over. 6 Q I'm transitioning to another topic here, 7 but we discussed before that you were getting from 8 mid-2007 through 2012 \$600,000 a year from Southern 9 Wine and Spirits; correct? 10 A Yes. 11 Q Now, if that \$600,000 a year had been paid 12 to Eber Brothers Wine & liquor Corp. instead of to 13 you and then you just received your salary, maybe 14 with an increase in it, would Eber Brothers Wine & 15 Liquor Corp. have needed any loans from you? 16 MR. RAMSEY: Form. 17 A Yes. 18 Q What is your basis for saying that? 19 A If you look, I put 7, 8million, 20 \$9 million. 21 Q Well -- 22 A But I worked for that money. 23 Q As of 2012, as of mid-2012 you put in 24 according to your foreclosure action that you filed, 25 a little over \$3 million and then with interest it</p>
<p style="text-align: right;">Page 443</p> <p>1 L. EBER 2 loaned and put into the company that kept it afloat 3 otherwise it would have been liquidated, the whole 4 system would have. 5 Q So that's what a reasonable creditor would 6 do, but why would a trustee allow that to happen? 7 MR. RAMSEY: Form. 8 Q Did you think about it from that 9 prospective at the time? 10 MR. RAMSEY: Form. 11 A I discussed it with the other trust 12 people. They knew about it. 13 Q And so what was your understanding as to 14 why it was beneficial for the trust for you to 15 foreclose on the loan? 16 MR. RAMSEY: Form. 17 A There wouldn't be a loan to foreclose on 18 if I didn't come up with the money. There wouldn't 19 be anything. The whole Eber Brothers, Eber 20 Connecticut would all go away. 21 Q Where did you get the money to loan to the 22 company? 23 A Where did I get the money? 24 Q Yes. 25 A I gave up 1.5 million in my pension plan,</p>	<p style="text-align: right;">Page 445</p> <p>1 L. EBER 2 was roughly \$3,650,000. Does that sound about 3 right? 4 A I don't know. It could have been more 5 with interest. I thought it was more but I would 6 have to check it. 7 Q And of that a lot of that was a loan that 8 had been given in 2006; is that right? 9 A I don't remember the dates of the loan. 10 Q Do you remember how much money you loaned 11 to Eber Brothers between mid-2007 and mid-2012? 12 A No. 13 MR. RAMSEY: Brian, unless you're 14 transitioning, we have done this. We have done 15 Southern before. There's nothing new about 16 this or about Southern. 17 Q With respect to the Southern transaction 18 did you discuss -- let me step back. You testified 19 before about your responsibilities was largely in 20 governmental relations work; correct? 21 A That was the start of it. 22 Q Okay. Did have any experience with 23 government relations? 24 A Yes. 25 Q How did you get that experience?</p>

<p style="text-align: right;">Page 446</p> <p>1 L. EBER 2 A From working over the years in the 3 legis -- with the -- we're regulated by the laws in 4 Albany and federally. 5 Q Who was paying your salary during that 6 time? 7 A Eber Brothers. 8 Q Eber Brothers Wine & Liquor Corp? 9 A Yes. 10 Q So other than your experience from working 11 with Eber Brothers Wine & Liquor Corp. did you have 12 any other way in which you acquired experience that 13 was relevant to your work with Southern? 14 A Yeah. I had taken courses, my education. 15 Q When was that? 16 A Well, I went after college and I worked. 17 I worked for the company but I had extra time. I 18 got into governmental affairs. 19 Q Did you ever think about whether your 20 consulting agreement with Southern was taking 21 anything away from Eber Brothers Wine & Liquor 22 Corp.? 23 MR. RAMSEY: Form. 24 A No. 25 MR. RAMSEY: Brian, you already asked</p>	<p style="text-align: right;">Page 448</p> <p>1 L. EBER 2 Q Do you know who David Dean is? 3 A Yes. 4 Q Who is he? 5 A He was the chief financial officer of 6 Slocum. 7 Q Did he continue working with Slocum after 8 Eber Brothers acquired it? 9 A Short period of time. 10 Q So this letter it says, it's a letter from 11 David Dean to John Ryan saying, "Enclosed, please, 12 find the due diligence binder responding to your 13 recent information request." Do you know what the 14 due diligence binder is? 15 A I have an idea. 16 Q What is your idea? 17 A After they done an audit of the company 18 what it shows. 19 Q So is it fair to say that this was 20 documentation that was relevant to whether Eber 21 Brothers would acquire Slocum & Sons and if so at 22 what price? 23 A It was something that they looked at but I 24 don't think it determined the price. 25 Q What did determine the price of Slocum &</p>
<p style="text-align: right;">Page 447</p> <p>1 L. EBER 2 these questions. 3 MR. BROOK: I don't know if I asked that. 4 MR. RAMSEY: Southern was covered in 5 depth. 6 MR. BROOK: Let's change the topic. Let's 7 mark this at Exhibit 111. So we're clear at 8 the outset, the topic was covered but a 9 document has not yet been produced. Exhibit 10 111 bears Bates numbers 33279 through 300. 11 (EB33279 to EB33300 was marked 12 as Plaintiff's Exhibit 111 for 13 identification.) 14 Q This is an excerpt to a larger file that 15 followed the cover letter. Do you recognize this at 16 all? 17 A I don't remember it. 18 Q Do you know who John Ryan is? 19 A Yes. 20 Q He was their chief financial officer; 21 correct? 22 A Yes. 23 Q This is a letter dated November 17, 2004 24 from David Dean. 25 A Yes.</p>	<p style="text-align: right;">Page 449</p> <p>1 L. EBER 2 Sons? 3 A What someone would pay for it. 4 Q So the financials didn't have any impact 5 on that; is that right? 6 A It's something but the important thing is 7 what a willing buyer will pay to buy a company. 8 Q How did you determine that? 9 A What the market would -- I did not do this 10 but it was what the market could pay in the 11 competitive bidding and how Strategic it was to Eber 12 Brothers in New York. 13 Q All right. So were you involved in 14 setting the price to pay? 15 A I was aware of some of it but I couldn't 16 say I was directly involved in the whole deal. 17 Q Who was involved in determining what price 18 Eber Brothers would pay from Slocum & Sons? 19 A Probably John Ryan and Pat Dalton. 20 Q Did you have any input on that? 21 A Yeah, I had input, and that it was 22 strategically, not on the price, but it was 23 strategically important to the welfare of New York 24 that we buy this company as opposed to a competitor 25 who would take the lines away from us in New York.</p>

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No.: 16-cv-951 (LAK)

DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS.

Plaintiff,

-against-

LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,
LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a
CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT
W. GUMAER, JR.; EBER BROS. & CO., INC., EBER
BROTHERS WINE AND LIQUOR CORPORATION;
BROS. WINE AND LIQUOR METRO, INC.,
EBER-CONNECTICUT, LLC; and WENDY EBER.

Defendants.

1250 Broadway
New York, New York 10001
February 28, 2019
9:45 a.m.

EXAMINATION BEFORE TRIAL OF WENDY EBER, held at
the above-mentioned time and place before ANNMARIE
OAKLEY, a Notary Public of the State of New York.

<p>1 2 APPEARANCES 3 4 BROOK & ASSOCIATES PLLC Attorneys for Plaintiffs 5 100 Church Street, 8th Floor New York, New York 10007 6 7 BY: BRIAN BROOK, ESQ. 8 9 UNDERBERG & KESSLER LLP Attorneys for Defendants 10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER BROTHERS & CO., INC; EBER BROS. WINE AND LIQUOR 11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER 12 50 Fountain Plaza Buffalo, New York 14202 13 BY: COLIN RAMSEY, ESQ. 14 15 JOHN HERBERT, ESQ. (Telephonically) Attorneys for Defendants 16 LESTER EBER and WENDY EBER PO Box 1031 17 Tiburone, California 94920 18 19 CALIHAN LAW PLLC Attorneys for Defendant 20 THE ESTATE OF ELLIOT W. GUMAER 16 Main Street 21 Rochester, New York 14614 22 BY: ROBERT B. CALIHAN, ESQ. 23 24 Also present: Howard Brodsky, videographer 25</p>	<p>Page 2</p> <p>1 W. EBER 2 VIDEOGRAPHER: Good morning. Here begins 3 the video recorded testimony of Wendy Eber taken by 4 the plaintiffs in the matter or Daniel Kleeberg et 5 al plaintiffs versus Lester Eber et al defendants, 6 index number 16-cv-9517 (LAK) in the United States 7 District Court Southern District of New York. This 8 deposition is proceeding at Veritext Legal Solution 9 1250 Broadway, Suite 2400, New York, New York 10 10001, on Thursday February 28, 2019 at 11 approximately 9:46. 12 My name is Howard Brodsky and I'm a legal 13 video specialist in association with Veritext Legal 14 Solutions with offices located in New York, New 15 York. The court reporter is AnnMarie Oakley in 16 association with Veritext. Will counsel, please, 17 state their appearances for the record. 18 MR. BROOK: Brian Brook of Brook & 19 Associates, PLLC, for the plaintiffs. 20 MR. RAMSEY: Colin Ramsey from Underberg & 21 Kessler for the Eber defendants. 22 MR. CALIHAN: Rob Calihan from Calihan 23 Law on behalf of the estate of Mike Gumaer. 24 VIDEOGRAPHER: Will remote counsel, 25 please, state his appearance.</p>
<p>1 2 STIPULATIONS 3 IT IS HEREBY STIPULATED AND AGREED, by and 4 among counsel for the respective parties hereto, 5 that the filing, sealing and certification of the 6 within deposition shall be and the same are waived; 7 8 IT IS FURTHER STIPULATED AND AGREED that 9 all objections, except as to the form of the 10 question, shall be reserved to the time of trial; 11 12 IT IS FURTHER STIPULATED AND AGREED that 13 the within deposition may be signed before a Notary 14 Public with the same force and effect as if signed 15 and sworn to before the court. 16 17 * * * 18 19 20 21 22 23 24 25</p>	<p>Page 3</p> <p>1 W. EBER 2 MR. HERBERT: John Herbert for Wendy and 3 Lester Eber. 4 THE FOREMAN: Will the court reporter, 5 please, swear in the witness. 6 WENDY EBER, having first been duly sworn by 7 a Notary Public of the State of New York, was 8 examined and testified as follows: 9 EXAMINATION BY MR. BROOK: 10 Q Would you state your name for the record, 11 please. 12 A Wendy Eber. 13 Q Would you state your address for the 14 record, please. 15 A 201 East 80th Street, Apartment 21A, New 16 York, New York 10075. 17 MR. RAMSEY: Like yesterday we're going to 18 read and sign. 19 Q Good morning, Ms. Eber. 20 A Good morning. 21 Q Because we have done this a couple of 22 times with the 30(b)(6) depositions I'm going to 23 presume that you know how this works but if you have 24 any questions, please, let me know. I'm going to 25 use the same general definitions as before in terms</p>

2 (Pages 2 - 5)

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<p>1 W. EBER</p> <p>2 Q Yes.</p> <p>3 A Yes.</p> <p>4 Q When did that occur, the negotiation?</p> <p>5 A I don't remember. What year is this?</p> <p>6 Q Again, your email is dated June 2011.</p> <p>7 A I know he claimed he had another offer</p> <p>8 from another company so I don't remember the</p> <p>9 details.</p> <p>10 Q In the notes on the right of that table it</p> <p>11 says, "John Slocum has an employment contract which</p> <p>12 expires in January 2012." Do you see that?</p> <p>13 A Yes.</p> <p>14 Q When was that employment contract executed</p> <p>15 to the best of your recollection?</p> <p>16 A I don't know if I was involved at the</p> <p>17 time. I did note when I was reading the merger</p> <p>18 document there were a lot of contracts in there. He</p> <p>19 may have had one at the time, but I wasn't involved</p> <p>20 in his contract.</p> <p>21 THE WITNESS: Can we take a break.</p> <p>22 MR. BROOK: Sure.</p> <p>23 VIDEOGRAPHER: The time is 10:52. We're</p> <p>24 off the record.</p> <p>25 VIDEOGRAPHER: Time is 11:04. We are on</p>	<p>Page 42</p> <p>1 W. EBER</p> <p>2 A It could have been the Teamsters.</p> <p>3 Q Could it have been PBGC?</p> <p>4 A No.</p> <p>5 Q Why do you say that?</p> <p>6 A This isn't something that I recall giving</p> <p>7 to the PBGC.</p> <p>8 Q Do you recall giving a presentation to the</p> <p>9 Teamsters in or about December 2011?</p> <p>10 A I did meet with them a couple of times.</p> <p>11 This could have been to maybe a bank too, trying to</p> <p>12 get a loan from a bank.</p> <p>13 Q Who prepared this presentation?</p> <p>14 A I believe I did.</p> <p>15 Q Did anyone assist you in preparing the</p> <p>16 presentation?</p> <p>17 A I don't remember. It may have been to a</p> <p>18 bank. I'm not sure.</p> <p>19 Q In terms of, you know, the date of</p> <p>20 December 29th of 2017 that's printed on this there</p> <p>21 is -- I got some questions in terms of just how</p> <p>22 documents were generally prepared for</p> <p>23 production in this case, because that date is after</p> <p>24 this lawsuit was filed; correct?</p> <p>25 A Yes.</p>
<p>1 W. EBER</p> <p>2 the record.</p> <p>3 MR. BROOK: All right. Go to another</p> <p>4 exhibit now. This one is being marked as</p> <p>5 Exhibit 69. It bears Bates EB31025 through</p> <p>6 034.</p> <p>7 (Ten-page document was marked</p> <p>8 as Plaintiff's Exhibit 69 for</p> <p>9 identification.)</p> <p>10 Q Do you recognize this document?</p> <p>11 (Witness reviewing document.)</p> <p>12 A Sort of. I'm confused by this date,</p> <p>13 12/29/2017.</p> <p>14 Q So according to the first page where it</p> <p>15 say Slocum and Sons December 2011 in the middle and</p> <p>16 the bottom left it says 12/29/17.</p> <p>17 A Yes.</p> <p>18 Q Is that the date when you printed this</p> <p>19 document perhaps from Microsoft Power Point?</p> <p>20 A I don't remember. I believe it was</p> <p>21 created December 12, 2011.</p> <p>22 Q Was it a presentation that was given on</p> <p>23 December 12, 2011?</p> <p>24 A I believe so, yes.</p> <p>25 Q What was the presentation given to?</p>	<p>Page 43</p> <p>1 W. EBER</p> <p>2 Q Who was involved in reviewing documents</p> <p>3 that were on computers for Slocum and Sons in order</p> <p>4 to respond to document requests in this case?</p> <p>5 A Me.</p> <p>6 Q Anyone else?</p> <p>7 A No.</p> <p>8 Q So do you recall opening up Microsoft Word</p> <p>9 and Microsoft Power Point files and printing those</p> <p>10 out?</p> <p>11 A Yeah, I did print out or send them to Paul</p> <p>12 electronically, our lawyer electronically, yes.</p> <p>13 Q And when you searched for emails did you</p> <p>14 follow the same process of either forwarding the</p> <p>15 email or printing them?</p> <p>16 A Yes.</p> <p>17 Q How did you decide whether to print an</p> <p>18 email or to forward it?</p> <p>19 A I don't recall individual things.</p> <p>20 Q When you saw emails with attachments did</p> <p>21 you print out the attachments as well?</p> <p>22 A I believe I did. I believe I did, yes,</p> <p>23 but I don't know if I did everyone but I believe so.</p> <p>24 Q Prior to this litigation was it your</p> <p>25 practice to regularly print out emails that you sent</p>

12 (Pages 42 - 45)

<p style="text-align: right;">Page 46</p> <p>1 W. EBER 2 or received? 3 A Sorry? 4 Q Before getting involved in with litigation 5 and having to look for documents was it your 6 practice just in terms of your day-to-day operation 7 of the business to print out emails that you sent or 8 received? 9 A You know, I printed out some emails, yes, 10 if they were, I thought something that I thought was 11 important or that I wanted to remember to do 12 something I would at times print the email. 13 Q What did you do with the emails that you 14 printed out during the regular course of business 15 after you printed them, meaning what you did with 16 the hard copies? 17 A It depends, sometimes I file them 18 sometimes left them on my desk, sometimes I did 19 whatever I needed to do with them and I throw them 20 in the garbage. It depends on what the email was. 21 Q Did you have any particular practice or 22 routine when it came to organizing your email inbox? 23 A No. 24 Q Did you regularly delete emails that you 25 received?</p>	<p style="text-align: right;">Page 48</p> <p>1 W. EBER 2 wendyefry@Gmail.com. 3 Q Why did you start that account? 4 A I got married and I, you know, thought it 5 would be nice. Sometimes I go by Fry socially 6 because of my husband. 7 Q Did you legally change your name to Fry? 8 A My driver's license says Wendy Eber. 9 Q When you filed for your marriage license 10 did you request to change your name with the state? 11 A Yes. 12 Q What is your legal name as a result of 13 that? 14 A Wendy Fry. 15 Q And what is your middle name or initial? 16 A P. 17 Q Do you ever use your nyc.rr.com email 18 account to communicate with individuals relating to 19 the Eber businesses? 20 A No. 21 Q Do you use the nyc.rr.com account to 22 communicate with Lester? 23 A I don't recall. I may have used it but 24 not typically. 25 Q Have you used the Gmail account to</p>
<p style="text-align: right;">Page 47</p> <p>1 W. EBER 2 A I did delete emails. 3 Q Did you also save emails in some way such 4 as through an archive or folder system? 5 A No, not really. No. 6 Q What email service did you use? Was it 7 Microsoft Outlook? 8 A Yes. 9 Q Did you use Microsoft Outlook at all times 10 since 2008? 11 A Yes. 12 Q Did you use Microsoft Outlook for both 13 business and personal accounts or only business 14 accounts? 15 A I have a Gmail account but I have Outlook 16 for work. 17 Q Since about 2008, I just want to focus on 18 the time period from 2008 forward. Please, tell me 19 all the different email addresses that you have used 20 to send or receive email whether for business or 21 personal reasons. 22 A From 2008 I have my work email which is 23 weber@slocumandsons.com and then I have an email 24 address weber4@nyc.rr.com and then I have a Gmail 25 account which I started in 2013, or something. It's</p>	<p style="text-align: right;">Page 49</p> <p>1 W. EBER 2 communicate with Lester? 3 A I don't recall. 4 Q Have you used the Gmail account to 5 communicate with anyone related to the Eber 6 businesses? 7 A No. 8 Q In responding to Discovery requests in his 9 case did you search your nyc.rr.com email account? 10 A No. 11 Q Did you search your Gmail account? 12 A No. 13 Q Why not? 14 A I don't use that typically to communicate 15 with people from work, for work related things. 16 Q But when you responded to my questions a 17 moment ago you weren't sure if you communicated with 18 Lester using those accounts; correct? 19 MR. RAMSEY: Form. 20 A I don't typically communicate with Lester 21 with my -- if I'm communicating with Lester it's for 22 work. It's with my work account. If maybe my 23 mother emails my father and I'm on it with him about 24 a family thing it might be on another account but 25 typically I communicate with Lester about work</p>

13 (Pages 46 - 49)

<p style="text-align: right;">Page 50</p> <p>1 W. EBER 2 related thing with my work account. 3 Q And you're -- how confident are you about 4 the fact that you probably have not communicated 5 with Lester through your personal email accounts at 6 any point since 2008? 7 MR. RAMSEY: Form. 8 A What? 9 Q Are you saying that you remember that you 10 didn't communicate with Lester using your personal 11 account at that time? 12 MR. RAMSEY: Form. 13 A I don't typically use -- if I'm going to 14 communicate with Lester I usually talk to him. It's 15 usually a conversation. I call him all the time. I 16 call him a couple of times a day or we talk by phone 17 or I see him in the office. You know, that's how I 18 communicate with Lester. 19 Q Have any of your friends or family members 20 who are not parties to this lawsuit communicated 21 with you about this lawsuit or the issues in it? 22 A I have spoken to my mother, yes. 23 Q What did you and your mother discuss about 24 this lawsuit? 25 A Not a lot of details, just it's more her</p>	<p style="text-align: right;">Page 52</p> <p>1 W. EBER 2 Q What is your understanding as to when 3 Lester had that conversation with him? 4 A When? 5 Q Yes. 6 A My understanding was that, um, Dan 7 Kleeberg had a conversation with Mark Stein and Mark 8 Stein said he had learned about the Article 9 sale 9 and that he told Danny about it and then Danny told 10 Lester about it and then Lester told me about his 11 conversation with Danny. 12 Q What did Lester tell you about that 13 conversation? 14 A I believe it was before Sally died. 15 Q What do you recall Lester telling you 16 about what Dan said in response to him informing him 17 about the transaction? 18 A Danny was well aware of the monies that 19 Lester had been lending into the company and 20 understood all these third-party creditors, 21 specifically the PBGC. 22 Q Just let me clarify. You're talking about 23 what Lester told you Dan had said at the time? I'm 24 not asking what you think Dan would do. I'm asking 25 you specifically what you recall Lester telling you</p>
<p style="text-align: right;">Page 51</p> <p>1 W. EBER 2 concern and it's more the hurt feelings. Were a 3 family and I went to Danny's wedding in 1974. I 4 went to Lisa's wedding. I went to Audrey's wedding. 5 We celebrate Passover together. We celebrated 6 Thanksgiving together. We celebrated Rosh Hashanah 7 together for the last, for Lester 60- 70 years, and, 8 um, it's more about just how hurtful it is and those 9 type of emotional feelings. 10 Q When you got married to Eric Fry were any 11 of my clients in attendance? 12 A They were. They came to my wedding. 13 Q All of them? 14 A Lisa was there. Sally was there. Danny 15 was there, and Danny's son was there. 16 Q Was Audrey Hays there? 17 A Audrey was not there. Her husband was 18 very sick at the time. She couldn't make it. 19 Q When is the first time that you recall 20 discussing with Dan Kleeberg the fact that the trust 21 no longer owned Eber Connecticut? 22 A I didn't have that conversation with him. 23 Q Not before this lawsuit was filed? 24 A No. Lester had that conversation with 25 him.</p>	<p style="text-align: right;">Page 53</p> <p>1 W. EBER 2 that Dan had said in response to him informing him 3 of the transaction. 4 A That he understood. I mean, I don't -- I 5 think what I was trying to say is he understood that 6 Lester had been putting in a lot of money into the 7 company, loaning money into the companies to save 8 the companies and he understood that and that, you 9 know. 10 Q Was anything about this conversation ever 11 documented? 12 MR. RAMSEY: Form. 13 A Well, there was an email from Danny to 14 Lester which basically Danny was asking Lester for 15 to find him another job and to continue paying him a 16 consulting fee from the company and, um, he, you 17 know, he knew Lester was loaning money into the 18 company so if Lester had to loan the money in he 19 didn't necessarily need the money but he would like 20 to continue to get the consulting fee so, um. 21 Q So that email was after the conversation 22 that he had with Lester? 23 A No. I think that was before. That was 24 in, I think, 209 when he was looking to get, looking 25 for money to be paid as a consultant.</p>

14 (Pages 50 - 53)

<p style="text-align: right;">Page 54</p> <p>1 W. EBER</p> <p>2 Q My question is focused on whether there 3 was any documentation, whether just email 4 memorializing it or notes or anything like that that 5 was made about the conversation that Lester said he 6 had with Dan Kleeberg in or around 2014 at the time 7 or afterwards not something that you think supports 8 it before.</p> <p>9 MR. RAMSEY: Form. Go ahead.</p> <p>10 A I didn't document it. I don't know if 11 Lester documented it. I didn't document that 12 phonecall or that conversation.</p> <p>13 Q Did Lester explain to you how the topic 14 came up?</p> <p>15 A No. I think that Danny and Lester spoke 16 very frequently about lots of subjects, especially 17 after the company closed or wound down and, you 18 know, also Danny was a supplier of Connecticut so we 19 did business with him and sold his products.</p> <p>20 Q I'm sorry. Can you -- I think you may 21 have said this but was this conversation that Lester 22 said he had with Dan before or after Sally died?</p> <p>23 A I believe it was before Sally died but 24 I -- yeah. I believe it was before and he 25 understood. I don't think Danny was angry. I don't</p>	<p style="text-align: right;">Page 56</p> <p>1 W. EBER</p> <p>2 the pension benefit so then her lawyer sued Eber 3 Brothers and then he got into negotiations with the 4 PBGC and Eber Brothers.</p> <p>5 Q This was all before the Alexbay 6 transaction; right?</p> <p>7 A No. This was after -- well, he signed 8 where he misrepresented that they didn't have a 9 Quadro, that was before the Alexbay.</p> <p>10 Q What do you mean by a Quadro?</p> <p>11 A Qualified Domestic Relations Order, which 12 designated that Gail Kleeberg was entitled to half 13 of his pension plan.</p> <p>14 Q What is your basis for saying that he made 15 that representation with intentional falsity?</p> <p>16 MR. RAMSEY: Form.</p> <p>17 A Because he signed a document that said 18 that he didn't have one when, in fact, he did have 19 one.</p> <p>20 Q So it's your view that if someone signs a 21 document that says something then they are 22 responsible for ensuring the accuracy of everything 23 that's in that document?</p> <p>24 MR. RAMSEY: Form. He testified at this 25 own deposition.</p>
<p style="text-align: right;">Page 55</p> <p>1 W. EBER</p> <p>2 think he -- you know, nothing comes up in my mind 3 that Danny was upset about anything because my 4 understanding was that Danny knew that Lester had 5 been lending money into the company, and I had 6 conversations with Danny about the pension 7 obligations with the PBGC and he was aware of that 8 liability.</p> <p>9 Q When was the conversation that you had 10 with Dan regarding the PBGC?</p> <p>11 A Um, do you have the interrogatories? 12 Because you know this is -- they're all detailed in 13 the interrogatories.</p> <p>14 MR. RAMSEY: Just whatever your best 15 recollection is today. Whatever your best 16 recollection is today.</p> <p>17 A I had several conversation with Danny 18 about the PBGC. His wife sued Eber -- excuse me. 19 His ex-wife, Gail Kleeberg sued Eber Brothers 20 because he falsified a document saying that he 21 didn't have a Quadro to get his pension plan and so 22 he wasn't paying his ex-wife the pension, the 23 pension she was entitled to through the Quadro so at 24 that point there was no administrator on the pension 25 plan to change the designation of the ex-wife to get</p>	<p style="text-align: right;">Page 57</p> <p>1 W. EBER</p> <p>2 THE WITNESS: Right. He testified to this 3 at his own deposition.</p> <p>4 Q Have you ever signed a document that 5 contained any factual inaccuracies?</p> <p>6 A I don't recall. I mean, I may have, yes, 7 signed something.</p> <p>8 Q Has Lester signed any documents that 9 contain factual inaccuracies that you're aware of?</p> <p>10 MR. RAMSEY: Form.</p> <p>11 A May have, I don't know all the specifics. 12 I'm just --</p> <p>13 MR. RAMSEY: Wait. Wait for a question.</p> <p>14 Q I wants to focus on your conversations 15 with Dan Kleeberg after the transfer of Eber Metro 16 to Alexbay. During any of those conversations with 17 Dan Kleeberg did you tell Dan Kleeberg that PBGC was 18 trying to collect money from Eber Connecticut?</p> <p>19 A I didn't use those words but I did use the 20 words that the companies had a pension liability and 21 the companies were responsible for that pension 22 liability which is going back to why -- just stay 23 with me here. Eber Brothers had a lawyer 24 representing it with the PBGC. Dan Kleeberg wanted 25 to use Eber Brothers lawyer to represent him with</p>

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<p style="text-align: right;">Page 58</p> <p>1 W. EBER 2 the PBGC because Gail Kleeberg's lawyer had 3 contacted the PBGC about Gail's Kleeberg's situation 4 about not receiving her benefit. So all of those 5 things I had discussed with Dan so Dan knew we were 6 talking to the PBGC about the liability there. He 7 knew that.</p> <p>8 Q And did you tell anything to Dan about the 9 specifics of what PBGC was trying to find out in 10 terms of the information about Eber Connecticut?</p> <p>11 A What do you mean?</p> <p>12 Q Well, PBGC was trying to get a lot of 13 information from you about Eber Connecticut and what 14 its financials were and its operations; correct?</p> <p>15 A Well, at some points they were and at 16 other points we were talking negotiating with them. 17 It went on for a very long time.</p> <p>18 Q I'm asking about the inquiries regarding 19 Eber Connecticut. I understand there's other things 20 there. Did you tell Dan Kleeberg about the fact 21 that PBGC was making inquiries about Eber 22 Connecticut's finances?</p> <p>23 A I may have. I don't remember the 24 specifics. I remember him saying that he called the 25 PBGC without an attorney and spoke with an attorney</p>	<p style="text-align: right;">Page 60</p> <p>1 W. EBER 2 A We were always trying to negotiate with 3 the PBGC to determine what we could pay, afford to 4 pay.</p> <p>5 Q So my question is --</p> <p>6 A So, yes.</p> <p>7 Q -- PBGC took the position during those 8 negotiations -- I'm sorry. Eber Connecticut took 9 the position during the negotiation with PBGC that 10 Eber Connecticut was not legally obligated to make 11 payments to the pension plan of Eber Brothers Wine 12 and Liquor Corp.; correct?</p> <p>13 MR. RAMSEY: Form.</p> <p>14 A There was negotiations. We always knew 15 that we had to pay something. There were liens on 16 Connecticut.</p> <p>17 Q Well, you fought against the lien on 18 Connecticut; correct?</p> <p>19 A Well, originally they put a lien on 20 Connecticut. There's -- I'm not an ERISA lawyer.</p> <p>21 Q I'm not asking you --</p> <p>22 A Well, I think this is an important point. 23 There are things called statutory liens, which I 24 don't know if you took this class in law school or 25 not but these things just arise so they don't even</p>
<p style="text-align: right;">Page 59</p> <p>1 W. EBER 2 there and I said, Danny, you need a lawyer to speak 3 to them. You can't just call them up, and so that's 4 what we got into this whole conversation about 5 having Eber Brothers represent Danny.</p> <p>6 Q I really want to try to get this done 7 today so I would really appreciate if you answered 8 my question about a minute earlier, so let's stay 9 focused on that. So when you might have spoken with 10 Dan about PBGC making inquiries about Eber 11 Connecticut's finances and operations did you 12 indicate to Dan Kleeberg that Eber Connecticut was 13 trying to avoid making payments to PBGC to fund the 14 pension benefit?</p> <p>15 A What?</p> <p>16 Q Well, Eber Connecticut wasn't willingly 17 making payment to PBGC for a period of years; 18 correct?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A The companies could not afford to make 21 payments. Yes, we were not making payments.</p> <p>22 Q And Eber Connecticut took the position 23 that it did not have to make payments to PBGC; isn't 24 that correct?</p> <p>25 MR. RAMSEY: Form.</p>	<p style="text-align: right;">Page 61</p> <p>1 W. EBER 2 have to put a lien on it. These are theoretical 3 liens. Right. So there were liens. And I don't 4 understand all the legalese to it but there were 5 liens that came on and then a lien came off and a 6 lien went back on.</p> <p>7 MR. RAMSEY: All right. You answered 8 question.</p> <p>9 A I mean it's a very --</p> <p>10 Q Did you tell Dan Kleeberg that Eber 11 Connecticut was taking the position that it did not 12 have to fund the pension benefits as a result of the 13 Alexbay transaction?</p> <p>14 A No. I didn't tell him. I don't believe I 15 told him something like that because I always 16 believed that --</p> <p>17 MR. RAMSEY: You answered the question.</p> <p>18 Q I'm going to focus to you on this Exhibit 19 69, page three of it. See the bulletpoints? The 20 third one says, "While we're losing money we have a 21 plan in place to become profitable this year. As a 22 result of our efforts are projecting our EBITDA to 23 go from negative \$535,000 to positive 305,000 by May 24 of 2012." Do you see that?</p> <p>25 A Yes.</p>

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<p style="text-align: right;">Page 62</p> <p>1 W. EBER</p> <p>2 Q And EBITDA is different than net income;</p> <p>3 correct?</p> <p>4 A Correct.</p> <p>5 Q What does EBITDA stand for?</p> <p>6 A Earning before interest, tax,</p> <p>7 depreciation.</p> <p>8 Q And amortization?</p> <p>9 A Amortization.</p> <p>10 Q Did Eber Connecticut keep track of what</p> <p>11 its EBITDA was?</p> <p>12 A I believe so, for the bank.</p> <p>13 Q Were there financial statements prepared</p> <p>14 that included lines on what the EBITDA was?</p> <p>15 A You mean audited financial statements?</p> <p>16 Q Not necessarily, maybe just a simple</p> <p>17 spreadsheet or regular emails saying what the EBITDA</p> <p>18 was.</p> <p>19 A Yes. I think we had convenience around</p> <p>20 these types of, um, convenience which was related to</p> <p>21 the EBITDA, yes.</p> <p>22 Q So why in this presentation were you</p> <p>23 pointing out what the EBITDA was rather than talking</p> <p>24 about net income numbers?</p> <p>25 A I think this was for the bank. I think</p>	<p style="text-align: right;">Page 64</p> <p>1 W. EBER</p> <p>2 Q And was it taxed as a distributor as well?</p> <p>3 A What kind? You mean state tax?</p> <p>4 Q What kind of state taxes were imposed on</p> <p>5 Eber Connecticut as a result of its business as a</p> <p>6 distributor?</p> <p>7 A You mean sales tax?</p> <p>8 Q Did it pay sales taxes?</p> <p>9 A I believe there are some -- there's, like,</p> <p>10 gallonage tax but I don't know if that relates to</p> <p>11 this tax number here.</p> <p>12 Q Were there sales taxes?</p> <p>13 A I'm not sure. I'm not sure. I don't do</p> <p>14 the taxes so I don't know specifically. I don't</p> <p>15 know if -- this is an LLC and I think this tax</p> <p>16 number -- I'm not sure necessarily relates to, um,</p> <p>17 the tax. I think it's more the depreciation and the</p> <p>18 interest that would be an add back here. Those</p> <p>19 would be the factors really impacting this number.</p> <p>20 Q So the interest was primarily interest on</p> <p>21 bank loans; is that right?</p> <p>22 A Yes.</p> <p>23 Q Was there any other significant interest</p> <p>24 expense?</p> <p>25 A I don't think so. I think it all related</p>
<p style="text-align: right;">Page 63</p> <p>1 W. EBER</p> <p>2 this presentation was for a bank, trying to get a</p> <p>3 bank loan.</p> <p>4 Q And so why was EBITDA being used with the</p> <p>5 banks instead of net income.</p> <p>6 A Just to show -- I think the banks look at</p> <p>7 EBITDA.</p> <p>8 Q What is your understanding as to why they</p> <p>9 use EBITDA instead of net income?</p> <p>10 A It's before interest and tax and</p> <p>11 depreciation. I still think EBITDA may have been</p> <p>12 negative in 2012.</p> <p>13 Q It says that right there. I wasn't asking</p> <p>14 about that. For the EBITDA numbers that Eber</p> <p>15 Connecticut prepared for the bank, or otherwise,</p> <p>16 were all of the taxes that were paid by Eber</p> <p>17 Connecticut taken out or were there some taxes that</p> <p>18 remained there in there as expenses effecting the</p> <p>19 EBITDA number?</p> <p>20 MR. RAMSEY: Form. Go ahead.</p> <p>21 A I don't know.</p> <p>22 Q So as far as Eber Connecticut's business</p> <p>23 is it fair to say it had to be licensed by the State</p> <p>24 of Connecticut to be a distributor?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 65</p> <p>1 W. EBER</p> <p>2 to loans.</p> <p>3 Q I want to focus your attention on page</p> <p>4 nine of this. Actually, I'm sorry page eight. So</p> <p>5 refers here to cost savings efforts, identify the</p> <p>6 following opportunities, and it refers to three</p> <p>7 things there. Is it correct to understand this as</p> <p>8 saying these are opportunities for further cost</p> <p>9 savings or that these are the three items that are</p> <p>10 not things that had not already taken place by that</p> <p>11 point?</p> <p>12 A So this is something from December. This</p> <p>13 is fiscal year 2012. It may have been something we</p> <p>14 were in the process of implementing because it would</p> <p>15 have been during our fiscal 2012 year. So it was</p> <p>16 probably in process.</p> <p>17 Q So finance contracted out resulting in</p> <p>18 \$100,000 savings. What is that referring to?</p> <p>19 A That was going back to Wally being hired</p> <p>20 as a consultant as opposed to Dave Dean who was a</p> <p>21 full-time employee who had FICA and health care and</p> <p>22 all that stuff.</p> <p>23 Q When was Wally given the title of CFO?</p> <p>24 Was it at some point later?</p> <p>25 A Yeah. Well, he would start out as a</p>

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No.: 16-cv-9517 (LAK)

DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS.

Plaintiff,

-against-

LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT W. GUMAER, JR.; EBER BROS. & CO., INC., EBER BROTHERS WINE AND LIQUOR CORPORATION; BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER,

Defendants.

1250 Broadway

New York, New York 10001

June 28, 2019

9:42 a.m.

CONTINUED VIDEOTAPED DEPOSITION OF WENDY EBER
held at the above-mentioned time and place before
ANNMARIE OAKLEY, a Notary Public of the State of
New York.

<p>1 2 APPEARANCES 3 4 BROOK & ASSOCIATES PLLC Attorneys for Plaintiffs 5 100 Church Street, 8th Floor New York, New York 10007 6 7 BY: BRIAN BROOKS, ESQ. 8 9 UNDERBERG & KESSLER LLP Attorneys for Defendants 10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER BROTHERS & CO., INC; EBER BROS. WINE AND LIQUOR 11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER 12 50 Fountain Plaza Buffalo, New York 14202 13 BY: COLIN RAMSEY, ESQ. 14 15 16 CALIHAN LAW PLLC Attorneys for Defendant 17 THE ESTATE OF ELLIOT W. GUMAER 16 Main Street 18 Rochester, New York 14614 19 BY: ROBERT B. CALIHAN, ESQ. 20 21 Also present: PHIL GALUBERSON, videographer 22 DAN KLEEBERG, telephonically 23 24 25</p>	<p>Page 219</p> <p>1 W. EBER 2 financially interested in the outcome. Counsel 3 and all present in the room will now state 4 their appearances and affiliations for the 5 record. 6 MR. BROOK: Brian Brook of Brook & 7 Associates, counsel for plaintiff is here, and 8 one of my clients, Daniel Kleeberg, is on the 9 telephone. 10 MR. RAMSEY: Colin Ramsey from Underberg & 11 Kessler for the Eber defendants. 12 MR. CALIHAN: Rob Calihan on behalf of 13 Calihan Law representing the estate of Elliot 14 Gumaer. 15 VIDEOGRAPHER: Will the record, please, 16 swear in the witness. 17 W E N D Y E B E R, having been previously sworn by 18 a Notary Public of the State of New York, was 19 examined and testified as follows: 20 EXAMINATION BY MR. BROOK: 21 Would you state your name for the record, please. 22 A Wendy Eber. 23 Q Would you state your address for the 24 record, please. 25 A 201 East 80th Street, Apartment 21A, New</p>
<p>1 2 W. EBER 3 4 VIDEOGRAPHER: Good morning, we are going 5 on the record at 9:42 a.m. on June 28, 2019. 6 Please, note that the microphones are sensitive 7 and may pick up whispers, private conversation 8 and cellular interference. Please, turn off 9 all cellphones or place them away from the 10 microphones as they can interfere with the 11 deposition audio. Audio and video recording 12 will continue to take place unless all parties 13 agree to go off the record. This is media unit 14 one, day two of the video recorded deposition 15 of Wendy Eber in the matter of Daniel Kleeberg 16 versus Lester Eber et al. filed in the United 17 States District Court Southern District of New 18 York, Civil Action number 16-cv-9517(LAK) 19 MR. BROOK: 9517. 20 VIDEOGRAPHER: This deposition is being 21 held at Veritext, located at 1250 Broadway, New 22 York, New York. My name is Phil Glauberson 23 from the firm Veritext and I am the 24 videographer. The court reporter is Annmarie 25 Oakley from the firm Veritext. I am not authorized to administer an oath. I am not related to any party in this action, nor am I</p>	<p>Page 220</p> <p>1 W. EBER 2 York, New York 10075. 3 Q Good morning, Ms. Eber. 4 A Good morning. 5 Q I want to start out by asking if, you know 6 we had three days before in these depositions, if 7 there's any reason why you may think that I may need 8 to go over how this deposition is going to work or 9 how you should be addressing my questions, if you 10 don't understand and things like that? 11 MR. RAMSEY: The grounds rule. 12 Q Do we need to go over the ground rules? 13 A Okay, you can. 14 Q Well, the court reporter is taking down 15 everything that we say so the most important thing 16 is we try not to talk over each other. If I ask you 17 a question if there's any part of it that you don't 18 understand you should say that to me because if you 19 answer the question I'm going to assume that you 20 understood it. 21 A Okay. 22 Q And those are the, I think, two of the 23 basics. We have a limited amount of time here but 24 breaks don't count for that so if you need to take a 25 break you can do so, just say it. The only thing I</p>

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<p style="text-align: right;">Page 323</p> <p>1 W. EBER 2 MR. BROOK: Who at Eder Goodman. 3 A It was also between Pat Dalton. I think 4 the lawyers were involved in it as well. 5 Q So you think the lawyers might have wanted 6 you to get the right of first refusal? 7 A No. I'm saying the lawyers were involved 8 in the whole thing so the whole negotiation as well. 9 Q So are you -- but what does that have to 10 do with who at Eder Goodman insisted that you get 11 this right of first refusal? 12 A I don't remember exactly. 13 MR. BROOK: This is Exhibit 121 and 14 jumping forward this is an email dated March 9, 15 2012, Bates number EB31199. 16 (EB31199 was marked as 17 Plaintiff's Exhibit 121 for 18 identification.) 19 Q This is an email that you printed out; 20 correct? 21 A Yes. 22 Q And it's one that you sent to Mike Gumaer; 23 correct? 24 A Yes. 25 Q And the subject says it's a forward of</p>	<p style="text-align: right;">Page 325</p> <p>1 W. EBER 2 the foreclosure action so he knew what you were 3 talking about here? 4 A I don't remember the exact dates because 5 this is, you know, seven years ago here but I know 6 that Mike was aware of all of the loans that Lester 7 had put into the company. He was aware of all of 8 the liabilities that the company faced and he was, 9 he knew generally what was going on in the company. 10 Q My question is about the foreclosure 11 action. 12 A I don't recall exactly when he found out 13 but he was aware. 14 MR. BROOK: Let's mark this as Exhibit 15 122, Bates EB26652. 16 (EB26652 was marked as 17 Plaintiff's Exhibit 122.) 18 Q This is sent four days later on March 13, 19 2012 from Mike to you; correct? 20 A Right. 21 Q And he says, "Wendy, We'll talk at 4 p.m. 22 I'm not in a position to discuss in any depth the 23 Alex Bay matter as I learned of the matter yesterday 24 afternoon in the email from Underberg." Let me stop 25 there. Do you know what email from Underberg he was</p>
<p style="text-align: right;">Page 324</p> <p>1 W. EBER 2 something January Eber CT. Do you see that? 3 A Yes. 4 Q Where's the forwarded text? 5 A I don't know. 6 Q Did you delete that. 7 A No. I mean, I didn't delete anything. I 8 haven't deleted anything from the time you sued us 9 so, I mean, I don't know if this may have been a 10 printout. I don't know. 11 Q In the email you said, "Mike, Please 12 confirm that you have a conference call today at 4 13 p.m. with Glenn and that he will be in Rochester on 14 Tuesday and Wednesday next week. You need to speak 15 with Rick Hawks." message importance is high; 16 correct? 17 A Yes. 18 Q Why was it that you said that Mike Gumaer 19 needed to speak with Rick Hawks? 20 A I think this is the time of the 21 foreclosure or the filing of the foreclosure 22 documents and there were numerous phonecalls, I 23 think, and meetings that week regarding the 24 foreclosure. 25 Q Had you already apprized Mike Gumaer of</p>	<p style="text-align: right;">Page 326</p> <p>1 W. EBER 2 referring to there? 3 A I'm not certain. I mean, I do have a copy 4 of it. 5 Q I'm asking if you know. When you say 6 you're not certain what are you referring to? 7 MR. RAMSEY: You're not certain what he's 8 referring to? 9 THE WITNESS: No. 10 Q Do you believe you asked Underberg to 11 forward him a copy of the Alex Bay Complaint? 12 A I may have. I just don't remember. 13 Q And so is it fair to say that you had not 14 discussed the Alex Bay foreclosure action with Mike 15 Gumaer prior to Monday, March 12, 2012? 16 MR. RAMSEY: Form. 17 A Well, he was well aware of the loans that 18 Lester put into -- 19 Q Focus on the foreclosure action not the 20 loans themselves. 21 A Right. He was well aware but I'm not sure 22 exactly when he was notified of the foreclosure 23 action but he knew about the loans and he knew about 24 the financial situation of the company and all the 25 liabilities out there that Lester was financing</p>

<p style="text-align: right;">Page 327</p> <p>1 W. EBER 2 everything. 3 Q Just so we're clear, because you gave a 4 long answer there, are you disputing the statement 5 here that according to Mike Gumaer he learned of the 6 matter the day before the date of this email in an 7 email from Underberg? 8 MR. RAMSEY: Form. 9 A He learned of the foreclosure? 10 Q Yes. Do you dispute that? 11 A Well, that's what's written here. 12 Q Do have any basis to dispute that? 13 A I don't know. 14 Q Next line says, he wrote, "Hawks will be 15 interested in knowing as will I what will be the 16 status of the Eber trust with respect to Eber assets 17 held in the trust. You may wish to have someone 18 from Underberg on hand to address these issues." and 19 then it says "on the survive" which I think means 20 surface, "it looks like Lester is moving against the 21 trust to which he is a cotrustee." Do you see that? 22 A Yes. 23 Q Can you think of anything other than what 24 surface, what word he might have meant if it wasn't 25 surface in that last sentence?</p>	<p style="text-align: right;">Page 329</p> <p>1 W. EBER 2 think, board meetings. I had numerous call with 3 him. 4 Q So I'm asking, I'm try together 5 understand, do you recall anything specifically that 6 you told him in terms of new information that he 7 didn't already have to allay his concern that on the 8 surface it looked like Lester was moving against the 9 trust of which he was a cotrustee. 10 MR. RAMSEY: Form. 11 A He's stating that that's what it looks 12 like and that's what it was. Lester was moving 13 against company. Yes. 14 MR. BROOK: This is going to be 123. This 15 is an email and an attachment sent on March 12, 16 2012 from you to, looks like, Marino Fernandez 17 and Mike Gumaer. 18 (March 12, 2012 email was 19 marked as Plaintiff's Exhibit 20 123 for identification.) 21 Q Do you see that. 22 A Yes. 23 Q It looks like you had scanned or someone 24 had scanned for you a term sheet with CNB about Eber 25 Connecticut, well, not just a term sheet but a</p>
<p style="text-align: right;">Page 328</p> <p>1 W. EBER 2 A I don't know. 3 Q Do you recall discussing this concern with 4 Gumaer? 5 A Yes. Yes. 6 Q What did say to him about it? 7 A Well, you know, just as I have said 8 throughout this deposition we -- and actually this 9 week we, you know, that March 13th week we had many, 10 many calls about, you know, all the monies that 11 Lester had loaned into the company. The -- 12 Q He was already well aware of that though; 13 right? 14 A Who? 15 Q You just said that Mike Gumaer was already 16 well aware of the loans and everything and he still 17 had these concerns, so I'm asking you to focus on 18 what you said after this point in response to his 19 concerns. 20 A Right. That we talked about what Lester 21 was doing. I had a lot of conversations with him 22 about the loans that were secured loans, all the 23 debts that Eber Brothers had, the continued legacy 24 liabilities, all that information, the financial 25 distress of the companies and he was -- we had, I</p>	<p style="text-align: right;">Page 330</p> <p>1 W. EBER 2 signed and executed term sheet to Mike Gumaer and 3 Marino Fernandez. Why were you doing that? 4 A I don't know. I don't remember. 5 Q And Marino Fernandez asked -- just to make 6 sure we're on the same page, Marino Fernandez was 7 the lawyer that was retained by Eber Brothers Wine & 8 Liquor Corp. to represent it in the foreclosure 9 action; is that right? 10 A Yes. 11 Q Can you recall what he was doing looking 12 at this bank loan? 13 A I don't remember. 14 Q Can you recall what the relevance was of 15 the bank loan to anything that was going on at the 16 time? 17 MR. RAMSEY: Form. 18 A No. I mean that we were -- 19 MR. RAMSEY: Hold on. If you remember you 20 remember. Don't speculate. 21 A No. 22 MR. BROOK: All right. We're up to 124. 23 Now in is email with Bates number 26650 with an 24 attachment, Bates number 26650 and the 25 attachment with Bates numbers 26650A and B.</p>

29 (Pages 327 - 330)

<p style="text-align: right;">Page 331</p> <p>1 W. EBER 2 (Bates 26650A to 26650B was 3 marked as Plaintiff's Exhibit 4 124 for identification.) 5 A Yes. 6 Q So this is the consent form by which the 7 board of Eber Brothers Wine & Liquor, at the time 8 was just you and Mike Gumaer, consented to the 9 transfer of stock from Alex Bay to satisfy the 10 obligations to Alex Bay; correct? 11 A Yes. 12 Q Is it correct that this is a document that 13 was drafted by Underberg Kessler? 14 A Looks like it was. 15 Q Why was Underberg Kessler drafting a 16 resolution for Eber Brothers Wine & Liquor Corp.? 17 MR. RAMSEY: Form. 18 A I don't know. 19 Q And this email was sent by someone at 20 Underberg Kessler, looking at the second one before 21 you forwarded it, sent from somebody named Marcy 22 McQue (phonetic) from Marcy Davis McQue. I'm not 23 sure I follow that. Do you know who that is? 24 A Where? 25 Q In the email that you were forwarding, so</p>	<p style="text-align: right;">Page 333</p> <p>1 W. EBER 2 this email who was a lawyer representing Eber 3 Brothers Wine & Liquor Corp.? 4 A On this email that is correct. 5 Q Was there a lawyer for Eber Brothers Wine 6 & Liquor Corp. that every reviewed this document? 7 A Maybe. I don't remember. 8 Q Who did you think that lawyer might have 9 been? 10 A Marino, Mike Gumaer was also a lawyer too. 11 Q I want to ask you some questions about 12 your communications with Marino Fernandez now that 13 the court has ruled that's something that is subject 14 to Discovery. When did you first speak with Marino 15 Fernandez about the foreclosure action? 16 A I don't remember the exact date. I don't 17 remember. 18 Q Do you recall what you discussed? About 19 what our needs were? 20 A I don't -- I mean, that's many years ago. 21 It's, like, seven years ago. I don't really 22 remember all the details. 23 Q What, if any, questions did you ask Marino 24 Fernandez to look into? 25 A I don't remember. Like, specific</p>
<p style="text-align: right;">Page 332</p> <p>1 W. EBER 2 looking down about a third way of the page, it's 3 from somebody named Marcy McQue. It looks like 4 she's an administrative assistant. Do you know her 5 personally? 6 A No. 7 Q And she was sending this to you, to 8 Lester, to Glenn Sturm, to David Belt; right? Do 9 you see that? 10 A Yes. 11 Q And copying several lawyers at Underberg & 12 Kessler; is that right? 13 A Yes. 14 Q So there were a lot of lawyers on this 15 email; correct? 16 A There's a lot of lawyers on this email. 17 Yes. 18 Q But Marino Fernandez was not one of the 19 lawyers on this; correct? 20 A He's not on this email, no. 21 Q And you never sent him this document to 22 review? 23 MR. RAMSEY: Form. 24 A I don't remember. 25 Q And so is it correct there was no one on</p>	<p style="text-align: right;">Page 334</p> <p>1 W. EBER 2 conversations and stuff? 3 Q Or just general issues. Was there 4 anything in particular that you wanted Marino 5 Ferandez to do to protect the rights of Eber 6 Brothers Wine & Liquor Corp.? 7 A I mean, sitting here I just don't 8 remember. I don't recall. 9 Q What did he tell you his qualifications 10 were to do this kind of corporate work? 11 MR. RAMSEY: Form. 12 A Well, he was a lawyer that was recommended 13 to us by Paul Keneally. So it's a small community 14 in Rochester. Everyone, kind of, knows each other 15 on the legal front so I thought he was a good 16 choice. 17 Q Did Marino Fernandez offer any opinions 18 about the foreclosure action? 19 MR. RAMSEY: Form. 20 MR. CALIHAN: Form. 21 A As far as what? 22 MR. BROOK: What's the objection? 23 MR. CALIHAN: A formal opinion or -- 24 Q Did he offer any opinions on whether Eber 25 Brothers Wine & Liquor Corp. should consent to</p>

30 (Pages 331 - 334)

<p style="text-align: right;">Page 335</p> <p>1 W. EBER</p> <p>2 Lester's request to take the shares of Eber Metro in 3 full satisfaction of the debts?</p> <p>4 A If we should?</p> <p>5 Q Yes.</p> <p>6 A There weren't any alternatives. I mean, 7 Brian, there's no money to pay for anyone here. 8 There are no alternatives. So, yeah, I mean it's 9 just -- this is, kind of, a situation where we 10 waived all of our defenses and that was suggested by 11 him.</p> <p>12 Q He suggested waiving all your defenses?</p> <p>13 A There weren't any defenses. There's no 14 money here. There's no money to pay Marino, let 15 alone, you know, do anything. Who's going to pay 16 for the defenses? Yeah.</p> <p>17 Q It was a decision to waive defenses out of 18 the concern of the cost; is that right?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A Well, just resources, cost, there's no 21 defenses. Yeah. I mean, yes, he supported that.</p> <p>22 Q And did you get anything in writing from 23 him in terms of any legal opinions?</p> <p>24 MR. RAMSEY: Form.</p> <p>25 A A written legal opinion?</p>	<p style="text-align: right;">Page 337</p> <p>1 W. EBER</p> <p>2 Q And in terms of your discussions with 3 either Marino Fernandez or Glenn Sturm was there any 4 discussion about how the transfer of Eber Metro to 5 Alex Bay would effect the shareholders and the value 6 of the shareholders in Eber Brothers Wine & Liquor 7 Corp.?</p> <p>8 MR. RAMSEY: Form.</p> <p>9 A Say that again.</p> <p>10 Q Let me rephrase. Was there any discussion 11 about how the transfer of Eber Metro to Alex Bay 12 would effect the value of the shares of Eber 13 Brothers Wine & Liquor Corp. for the shareholders?</p> <p>14 A With?</p> <p>15 Q With either Glenn Sturm or Marino 16 Fernandez?</p> <p>17 A You know, sitting here today I don't 18 recall. I'm sure there were conversations. I just 19 don't remember, like, a specific conversation.</p> <p>20 MR. RAMSEY: Okay. Then you answered the 21 question.</p> <p>22 Q And so when you say you're sure it makes 23 it a little confusing. Do you recall any general 24 conversation or what their conclusion was about the 25 value of the shares and how that would be effected?</p>
<p style="text-align: right;">Page 336</p> <p>1 W. EBER</p> <p>2 Q Any written legal opinion, even just an 3 email?</p> <p>4 A No. I don't know if -- I don't think 5 there was a written opinion. No.</p> <p>6 Q And who was on the discussion with him 7 when he apparently gave you the opinion about waving 8 all the defenses?</p> <p>9 MR. RAMSEY: Form.</p> <p>10 A You have the minutes right, so there was a 11 meeting, I think, in --</p> <p>12 Q Just the board meeting, then with Lester 13 and Mike Gumaer?</p> <p>14 A And I believe he was on one of the calls 15 too. We had many calls and he was on the call, 16 Gumaer was on the call. Then I called Gumaer, Mike 17 at a later date. I spoke with Marino later dates. 18 I don't know if you have the minutes or not.</p> <p>19 MR. RAMSEY: All right. You answered the 20 question.</p> <p>21 Q Did you consult with any other lawyers, 22 besides Marino Fernandez, about how the transfer of 23 Eber Metro would affect Eber Brothers Wine & Liquor 24 Corp.?</p> <p>25 A I may have talked to Glenn about it.</p>	<p style="text-align: right;">Page 338</p> <p>1 W. EBER</p> <p>2 A I just don't. You know, there was a lot 3 of things going on I don't remember. The companies 4 were insolvent.</p> <p>5 MR. RAMSEY: You answered the question.</p> <p>6 You don't remember. The answer is okay.</p> <p>7 MR. BROOK: Let's go to Exhibit 125. 8 Start off by asking -- well, let me put the 9 Bates number. It appears to be part of an 10 email with Bates number EB31212 and an 11 attachment of EB31212A. 12 (EB31212 and EB31212A was 13 marked as Plaintiff's Exhibit 14 125 for identification.)</p> <p>15 Q What happened to the top part of this 16 email?</p> <p>17 A I don't know.</p> <p>18 MR. BROOK: We'll request that a complete 19 copy of this be provided or that the redaction 20 log be provided that explains why a document 21 that has already been produced is being 22 produced in redacted form, and I just want to 23 request that I am requesting it for the record.</p> <p>24 Q So because one of the problems here is 25 this doesn't have a date or anything on it but I</p>

<p style="text-align: right;">Page 339</p> <p>1 W. EBER 2 will -- hopefully if you need a second to read it 3 but hopefully you can answer some questions on it 4 anyway. Do you know who Jim is in this email? 5 A I believe it's Jim Frizano. (phonetic) 6 Q And you're sending to him a proforma 7 analysis of how the trust should be distributed; is 8 that right? 9 A Yes. 10 Q Why was this prepared? 11 A Well, this was prepared because 12 Canandaigua wanted to distribute the trust and they 13 sent out, like, their -- how they were going to 14 distribute it, and one of the items that they didn't 15 take into consideration was that Erica Stein was 16 getting distributions from the trust, which were 17 supposed to be subtracted from Lisa Stein's portion 18 of the trust. 19 Q Okay. So you were providing different 20 numbers for how you believe the assets should be 21 distributed versus what CNB had initially proposed? 22 A For the -- not anything to do with the 23 Eber Brothers equity, only the marketable securities 24 so the Eber, you notice, was taken out. I didn't do 25 anything with that. This was just on the account</p>	<p style="text-align: right;">Page 341</p> <p>1 W. EBER 2 Q Subsequent to sending this proforma 3 analysis to Jim Frizano did you make any further 4 adjustments to what you thought the distribution of 5 marketable assets should be? 6 A What do you mean? 7 Q Well, after, whenever you sent this to Jim 8 Frizano, did you find any errors in here or find 9 anything that you think needed to changed in how it 10 would effect the ultimate distribution? 11 A I think this was the only -- I don't 12 remember if this was the final. I think this was 13 the final one. I mean, I don't know if they used 14 this one. They used something else I think. 15 Q But this is what you believe they should 16 have done; is that fair? 17 A I believe so, yes. 18 Q In your email you also mention something 19 in this second paragraph, "Since the Woods Oviatt 20 bills are being paid by the trust include charges 21 from the SDNY litigation, it's only fair that our 22 legal bills are paid as well by the trust." Did you 23 ever take any further steps to try to get legal 24 bills paid for by the trust? 25 A I don't believe so, no. I did note that</p>
<p style="text-align: right;">Page 340</p> <p>1 W. EBER 2 balance of the marketable cash and, you know, traded 3 stocks and things like that. 4 Q Okay. So it was in your view appropriate 5 to change the distribution of marketable securities 6 and other liquid assets but not to change anything 7 having to do with Eber Brothers & Co. stock; is that 8 right? 9 A Right. So you will see, like, the bank 10 said that, like, Lisa and Danny should get \$113,000 11 but -- well, Lisa should get \$113,000 but see she 12 should have been adjusted out the monies that were 13 advanced to Erica, about \$75,217, that were advanced 14 to Erica. So, you know, her adjusted distribution 15 on the marketable security should been about 16 \$50,566. 17 Q Who created this proforma analysis? 18 A I worked on it. 19 Q Did anyone else help you with it? 20 A I may have had some help with it. 21 Q Who may have helped you with it? 22 A I don't remember. 23 Q Are you proficient on how to use Microsoft 24 Excel yourself? 25 A Yes. I have a business degree.</p>	<p style="text-align: right;">Page 342</p> <p>1 W. EBER 2 they were -- there were a lot of bills from Woods 3 Oviatt that were taken out of the trust, yeah. 4 Q And do you know whether it's correct that 5 that included the SDNY litigation bills, that those 6 were actually taken from the trust? 7 A They may have been. They may have been. 8 I don't remember at this time. I don't remember if 9 I wrote this or not. You know, I would have gotten 10 it from -- I think there's was an allocation of 11 something and I was going through that report or 12 that document and I saw this so that's why I would 13 have asked for this but -- 14 Q You saw Woods Oviatt bills; right? 15 A Yeah. 16 Q Do you know whether those were bills for 17 the SDNY litigation or for the surrogates court 18 proceeding? 19 A I'm not sure. I don't know. 20 Q Did you ever see the Woods Oviatt bills? 21 A For the trust or the SDNY? 22 Q For whatever was paid for by the trust. 23 A There were some details in some documents 24 I believe that did have some -- you could see the 25 lawyers billings, so there were some bills I think.</p>

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 16-cv-951 (LAK)

DANIEL KLEEBERG, LISA STEIN and
AUDREY HAYS.

Plaintiffs,

-against-

LESTER EBER; ALEXBAY, LLC f/k/a LESTER
EBER, LLC; CANANDAIGUA NATIONAL
CORPORATION d/b/a CANANDAIGUA NATIONAL
BANK & TRUST; ELLIOT W. GUMAER, JR.;
EBER BROS. & CO., INC.; EBER BROS.
WINE AND LIQUOR CORPORATION; EBER
BROS. WINE AND LIQUOR METRO, INC.,
EBER-CONNECTICUT, LLC; and WENDY EBER.

Defendants.

January 23, 2019

<p>1 2 January 23, 2019 3 9:41 a.m. 4 5 6 Videotaped 30(b)(6) Deposition of 7 WENDY EBER on behalf of Eber Bros. Wine & Liquor 8 Metro, Inc., held at the offices of Veritext New 9 York City, 1250 Broadway, New York, New York, 10 pursuant to Notice, before Lynne D. Metz, a 11 Shorthand Reporter and Notary Public of the State 12 of New York.</p> <p>13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 2</p> <p>1 2 A P P E A R A N C E S: (Cont'd): 3 4 JOHN HERBERT, ESQ. (Telephonically) 5 Attorneys for Defendants LESTER EBER and 6 WENDY EBER 7 P.O. Box 1031 8 Tiburone, California 94920 9 10 11 CALIHAN LAW PLLC 12 Attorneys for Defendant THE ESTATE of 13 ELLIOT W. GUMAER 14 16 East Main Street 15 Rochester, New York 14614 16 BY: ROBERT B. CALIHAN, ESQ. 17 18 19 ALSO PRESENT: 20 Wayne Saline - Videographer 21 Dan Kleeberg 22 Lester Eber 23 24 25</p>
<p>1 2 A P P E A R A N C E S: 3 4 BROOK & ASSOCIATES PLLC 5 Attorneys for Plaintiffs 6 100 Church Street 7 8th Floor 8 New York, New York 10007 9 BY: BRIAN C. BROOK, ESQ. 10 11 12 UNDERBERG & KESSLER LLP 13 Attorneys for Defendants LESTER EBER; 14 ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER 15 BROS. & CO., INC.; EBER BROS. WINE AND 16 LIQUOR CORPORATION; EBER BROS. WINE AND 17 LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; 18 and WENDY EBER 19 50 Fountain Plaza 20 Buffalo, New York 14202 21 BY: COLIN D. RAMSEY, ESQ. 22 23 24 25</p>	<p>Page 3</p> <p>1 2 3 4 IT IS HEREBY STIPULATED AND AGREED, by and 5 between the attorneys for the respective parties 6 herein, that filing and sealing be and the same 7 are hereby waived. 8 IT IS FURTHER STIPULATED AND AGREED 9 that all objections, except as to the form of the 10 question, shall be reserved to the time 11 of the trial. 12 IT IS FURTHER STIPULATED AND AGREED that the 13 within deposition may be signed and sworn to 14 before any officer authorized to administer an 15 oath, with the same force and effect as if signed 16 and sworn to before the officer before whom the 17 within deposition was taken. 18 19 20 21 22 23 24 25</p>

2 (Pages 2 - 5)

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<p style="text-align: right;">Page 70</p> <p>1 W. Eber 2 A. I think the first part where loans 3 that were made into Eber Brothers Wine and Liquor 4 Corp. I don't know all the legalese but there 5 were -- 6 MR. RAMSEY: The first line she is 7 referring to, correct me if I am wrong. 8 There is no B in the first line. 9 A. Oh, you are saying this one EWLC loan 10 versus EB. 11 Q. Yes. 12 A. Oh, no. I think that's a typo. 13 Q. So -- 14 A. Oh, I thought you were talking about 15 that. 16 Q. I am getting to that next. 17 A. Sorry. No, I think that's a typo. 18 Q. So then below the lines that say, we 19 will just say EBWL loan for all of them. 20 It says EBWL Metro Inc. loan on a 21 number of lines; right? 22 A. Right. 23 Q. So how did you determine for creating 24 this document whether to describe it as EBWL or 25 EBWL Metro?</p>	<p style="text-align: right;">Page 72</p> <p>1 W. Eber 2 Q. Plaintiffs' Exhibit 13 is a document 3 entitled Line of Credit Note bearing Bates numbers 4 EB 00017871 through 73, as well as Bates numbers 5 KSH 00001 through 3. 6 Do you recognize this document? 7 A. Vaguely. 8 Q. Is that your -- please turn to page 3. 9 Is that your signature? 10 A. Yeah. 11 Q. Does this refresh your recollection 12 that there was a line of credit note in the amount 13 of 1,500,000 dollars between Eber Metro and Lester 14 Eber? 15 A. Yes. 16 Q. And who negotiated the terms of this 17 note on behalf of Eber Metro? 18 A. I think Harris Beach was the lawyer. 19 So I don't specifically remember. You know, this 20 was the recession. We were -- we needed money. 21 No banks would give us money and this was -- we 22 were trying to get money and I don't remember the 23 details who negotiated this. 24 Q. Who determined the amount? 25 A. I don't remember.</p>
<p style="text-align: right;">Page 71</p> <p>1 W. Eber 2 A. I don't remember. 3 Q. Did you base it on the dates when Eber 4 Metro assumed the loan obligations of Eber 5 Brothers Wine and Liquor Corp.? 6 A. I don't remember Brian. I just don't 7 remember. 8 Q. Do you recall that there was a 1.5 9 million dollar line of credit note between Eber 10 Metro and Lester Eber? 11 A. I don't remember all the details of 12 the notes. 13 Q. Who -- was there anyone on behalf of 14 Eber Metro that was involved in negotiating the 15 line of credit note between Lester Eber and Eber 16 Metro? 17 A. What year was that? 18 Q. Let's get it in writing. 19 MR. BROOK: Please mark this as 20 Plaintiffs' Exhibit 13. 21 (Plaintiffs' Exhibit 13, a document 22 entitled Line of Credit Note bearing Bates 23 numbers EB 00017871 through 73, as well as 24 Bates numbers KSH 00001 through 3, marked 25 for identification, as of this date.)</p>	<p style="text-align: right;">Page 73</p> <p>1 W. Eber 2 Q. Take a look at page 1 paragraph 2 sets 3 out an interest rate of a non-default interest 4 rate of 12.5 percent per year. 5 Do you see that? 6 A. Yes. 7 Q. How was that interest rate determined? 8 A. Can I just take a minute to read this? 9 MR. RAMSEY: Sure. Take as much time 10 as you need. 11 Off the record. 12 (Discussion off the record.) 13 BY MR. BROOK: 14 A. Do you want me to read the whole 15 document or just the interest rate? 16 Q. No. I was just asking about the 17 interest rate. 18 How was that determined? 19 A. I don't remember. 20 Q. Do you recall there being any 21 negotiation of that amount? 22 A. I don't remember. I just don't 23 remember. You know, it's ten years ago. 24 Q. If you look at just the bottom of 25 paragraph 3 on that first page it sets the</p>

<p style="text-align: right;">Page 74</p> <p>1 W. Eber 2 maturity date at December 31, 2011. 3 Do you see that? 4 A. Can I read that paragraph? 5 Q. If you really need to, yes. 6 A. Do you know what this word is here 7 (indicating)? 8 MR. RAMSEY: Which one? 9 THE WITNESS: (Indicating.) 10 MR. RAMSEY: Annum. 11 A. Okay. 12 Q. So do you see the December 31, 2011 is set as the maturity date? 13 A. Yes. 14 Q. How is the maturity date determined? 15 A. I don't remember. 16 Q. From the date on the top of the document, it doesn't have a day but it says October 2009. 17 A. Do you see that? 18 Q. Yeah. 19 Q. Do you believe that date to be generally accurate as to when this note was executed? 20 A. Yes.</p>	<p style="text-align: right;">Page 76</p> <p>1 W. Eber 2 Go back and read my question two questions ago. I think I said it better then. 5 (Record read.) 6 MR. RAMSEY: Same objection. 7 MR. BROOK: I guess as long of a maturity date as possible. 9 MR. CALIHAN: Same objection. 10 A. I just don't remember the specifics around how the maturity date was determined. I just don't. I just don't remember. I know we were in desperate need of cash. You know, we had a lot of liabilities and needed money. I believe Mike Gumaer also looked at this document. He was involved in it and our lawyers Harris Beach was involved in it as well. Both attorneys and at the time we didn't have any other options. 19 Q. But you don't recall the maturity date being something that was a topic of discussion at the time? 22 A. I don't remember. This is ten years ago. I just don't remember it. 24 Q. This is the note, this Exhibit 13 is the note on which Eber Metro defaulted by failing</p>
<p style="text-align: right;">Page 75</p> <p>1 W. Eber 2 Q. Was that in the time period of the extremely difficult times? 4 A. October 2009? 5 Q. Yes. 6 A. Yes. 7 Q. So the maturity date is set at just over two years after that; correct? 9 A. Yes. 10 Q. From the perspective of Eber Metro and given the extremely difficult times it was facing, was it better to have as long a maturity date as possible? 14 MR. CALIHAN: Objection to form. 15 MR. RAMSEY: Form. 16 You can answer. 17 A. Can you repeat the question? 18 Q. Given the difficult times that were facing Eber Metro in October 2009, do you believe that it was in Eber Metro's interest to have a note that was not required to be paid back for as long as possible? 23 MR. RAMSEY: Form. 24 MR. CALIHAN: Objection to form. 25 MR. BROOK: That was a bad one.</p>	<p style="text-align: right;">Page 77</p> <p>1 W. Eber 2 to make payment in full by December 31, 2011; is that right? 4 A. I don't remember. There were several notes. You know, I don't have all of the notes in front of me. There were -- it was over three million dollars in what was owed in loans, but I don't remember the specifics of it. 9 Q. So was it your understanding that Eber Metro defaulted on more than one note? 11 A. I remember it being three point something million dollars of loans that Lester made and plus interest, plus the interest. 14 Q. But putting aside the other notes and I shouldn't have used the word the in my previous question, it is your understanding that Eber Metro did default on this note; correct? 18 A. I just don't remember all the specifics Brian. I don't remember all the specifics of all the loans. I know that he, that Lester loaned in over three million dollars plus interest and I know we had the lawyers look at all of this, but I don't remember all the specifics. 24 I haven't reviewed all the documents. 25 Q. What is your understanding of what it</p>

20 (Pages 74 - 77)

<p style="text-align: right;">Page 78</p> <p>1 W. Eber 2 means to default on a note? 3 A. That's, you know, there is no payments 4 made or interest made. 5 Q. So for example -- 6 A. I don't know what the legal definition 7 is. 8 MR. RAMSEY: All he is asking for is 9 your understanding. 10 A. There were no payments or interest 11 made. 12 Q. For example, in your understanding it 13 would be a default if the full amount of this note 14 were not paid by the maturity date of December 31, 15 2011; is that right? 16 MR. RAMSEY: Form. 17 Go ahead. 18 A. Can you rephrase the question? 19 Q. In your understanding of what it means 20 to default, would it have constituted default if 21 Eber Metro did not pay the amount of this note 22 including all principal and interest in full on or 23 before December 31, 2011, the maturity date? 24 MR. RAMSEY: Form. 25 You can answer.</p>	<p style="text-align: right;">Page 80</p> <p>1 W. Eber 2 question. 3 Q. At the time of the default December 4 31, 2011 you were the CFO and secretary of Eber 5 Metro; correct? 6 A. Yes. 7 Q. So as CFO were you aware that this 8 note was coming due at the end of the month in 9 December 2011? 10 A. I don't remember. I mean there were 11 -- I don't remember all the specifics. There was a 12 a lot of financial distress Brian. There was a 13 lot going on. So for me to step back whatever 14 eight years. 15 MR. RAMSEY: The answer is you don't 16 remember. 17 A. I just don't remember. I don't 18 remember everything that went on. 19 Q. Was there any attempt to try to 20 renegotiate this note and try to extend the 21 maturity date prior to the maturity date of 22 December 31st? 23 A. I don't remember. 24 Q. In your role with various Eber 25 entities you have been involved with bank loans;</p>
<p style="text-align: right;">Page 79</p> <p>1 W. Eber 2 A. Sorry? 3 MR. RAMSEY: Go ahead and answer. 4 A. Yes, that would be default if they 5 didn't pay on it. 6 Q. Do you have any reason to believe that 7 Eber Metro paid all principal and interest on this 8 note in full on or before December 31, 2011? 9 A. Rephrase that. Did? 10 Q. Did Eber Metro pay this note in full? 11 A. No, no. 12 Q. So I am having a hard time trying to 13 understand how you can be so confused. 14 So you understand that this note was 15 not paid by the maturity date; right? 16 A. No. It was not paid. 17 Q. So in your understanding of what a 18 default is you understand that there was a default 19 on this note; correct? 20 A. Yes. 21 MR. RAMSEY: You have answered the 22 question. You are good, okay. 23 A. I just haven't looked at these 24 documents in a long time. 25 MR. RAMSEY: Okay. Wait for a</p>	<p style="text-align: right;">Page 81</p> <p>1 W. Eber 2 correct? 3 A. Yes. 4 Q. And are you generally aware of when 5 those loans are becoming due, maturing and have to 6 be paid in full? 7 MR. RAMSEY: You are talking just in 8 general or -- 9 A. In general? 10 Q. The Eber entities. 11 I don't know if there was a bank loan 12 specific to Eber Metro, but in your role with 13 various Eber entities have you been involved in 14 tracking whether any bank loans are about to 15 mature and become due? And by be involved you 16 doing it or someone else is doing it and telling 17 you about it. 18 A. Someone else is doing it and telling 19 me about it. 20 MR. CALIHAN: I am sorry. 21 Could you read back the question? I 22 missed it completely. 23 (Record read.) 24 A. And I also have been aware of when 25 some loans have come due too.</p>

<p style="text-align: right;">Page 82</p> <p>1 W. Eber 2 Q. Are you also in those situations aware 3 of whether the company is going to be able to pay 4 those loans or not? 5 MR. RAMSEY: Form. Go ahead. 6 A. Yeah. I had some idea, yes. 7 Q. And when the company has not been in a 8 position where it can pay those loans, what have 9 you done? 10 MR. RAMSEY: Form. 11 MR. BROOK: Basis? 12 MR. RAMSEY: You are assuming she did 13 something or had to do something. 14 You can answer the question. 15 A. What's the question? 16 Q. In those situations where the company 17 has a loan to a bank that's becoming due but the 18 company is not able to pay it in full back on the 19 maturity date what, if anything, have you done 20 about it? 21 MR. RAMSEY: Same objection. 22 Go ahead. Don't let me throw you off. 23 A. Well, let's talk about the Wells Fargo 24 loan, okay. With Eber Brothers 130 million 25 dollars. I had no idea. I was not involved in</p>	<p style="text-align: right;">Page 84</p> <p>1 W. Eber 2 in to secure it. 3 Q. So you asked the bank to extend the 4 loan, that was one of the things you did; right? 5 MR. RAMSEY: Form. 6 A. Or we had lawyers try to help us 7 extend it. 8 Q. Without getting into the details of 9 what you specifically discussed with the lawyers 10 since there was a pending objection on that, what 11 was it that the lawyers -- what was your 12 understanding of what the lawyers were going to do 13 to extend the note without the bank's consent? 14 MR. RAMSEY: Form. 15 A. Say that -- ask that question again. 16 Q. Were the lawyers doing something that 17 would involve -- was it your understanding that 18 the lawyers could do something to extend the loans 19 without the bank agreeing to it? 20 MR. CALIHAN: Objection to form. 21 A. Say it again the lawyers. 22 Q. Was it your understanding that by 23 hiring lawyers that could be a way to extend the 24 loan without having the bank agree to extend the 25 loan?</p>
<p style="text-align: right;">Page 83</p> <p>1 W. Eber 2 that. 3 Q. I am talking about when you were 4 involved. Situations when you were involved you 5 were being made aware of it becoming due and you 6 realized that the company could not just pay the 7 loan off in full. 8 What, if anything, did you do in that 9 situation? 10 A. In some circumstances we had to ask 11 Lester to loan them money. 12 Q. And in other circumstances did you 13 talk to the banks? 14 A. We had to hire -- yeah. We talked to 15 banks. We talked to them. We had lawyers. 16 Q. What did you talk about, the banks? 17 A. I mean, like with Canandaigua Bank? 18 Q. If that's one that meets the 19 situation. 20 A. You know, I don't remember all the 21 specific conversations we had with them. You 22 know, we tried to extend or Lester had to 23 personally put money in to secure the loan. He 24 had to put more money in to secure it. He had to 25 leave more security than he had to put more cash</p>	<p style="text-align: right;">Page 85</p> <p>1 W. Eber 2 MR. RAMSEY: Form. 3 A. I don't remember. I don't remember. 4 I don't know. 5 Q. When you asked or when one of the Eber 6 companies has asked banks to extend the loans such 7 as Canandaigua Bank, it has sometimes been 8 successful in getting that to happen; hasn't it? 9 A. They extended some loans, yes. But 10 they always said they wanted to get out of the 11 loan. 12 Q. But they extended it anyway; didn't 13 they? 14 MR. CALIHAN: Objection to form. 15 MR. RAMSEY: Form. 16 Go ahead. 17 A. Yes, they did extend it, but they 18 would only do it under the circumstances of Lester 19 personally guaranteeing it and securing it with 20 five hundred thousand and then pledging more 21 assets and more assets and -- 22 Q. Sorry. Go ahead. 23 MR. RAMSEY: Are you done with your 24 answer? 25 THE WITNESS: Yes.</p>

<p style="text-align: right;">Page 86</p> <p>1 W. Eber 2 Q. When was the first time that a bank 3 asked Lester to pledge personal assets to support 4 his loan? 5 A. I don't know. 6 Q. Was it before the Alexbay deal or 7 after the Alexbay deal? 8 A. I don't remember. I know that I think 9 the 120 thousand was -- it may have been after. I 10 am not sure of the additional securities he had to 11 put there. I don't remember specifically. 12 Q. Why didn't you ask Lester to extend 13 the maturity date on the line of credit note 14 Exhibit 13? 15 MR. RAMSEY: Form. 16 MR. BROOK: Basis? 17 MR. RAMSEY: I don't know she had an 18 obligation to. 19 MR. BROOK: Whatever. 20 A. Sorry? 21 Q. You can answer the question. 22 A. What was the question? 23 MR. BROOK: Can you read it back 24 please? 25 (Record read.)</p>	<p style="text-align: right;">Page 88</p> <p>1 W. Eber 2 MR. BROOK: I mean it is her corporate 3 rep. 4 Q. You said a minute ago you didn't think 5 that you had to ask to extend the maturity. 6 What was your basis for that belief? 7 A. I don't remember. 8 Q. Did you think it was a good thing for 9 Eber Metro to default on the note? 10 MR. RAMSEY: Form. 11 A. Did I think it was a good thing for 12 Metro? I don't remember. I just remember there 13 was no -- there weren't a lot of alternatives 14 here. And I spoke with Mike. 15 MR. CALIHAN: Don't disclose legal 16 advice. 17 A. Okay. I spoke with Mike. He was an 18 attorney representing us. I definitely spoke with 19 him. 20 MR. BROOK: Just so the record is 21 clear, we do not waive the right to insist 22 on getting complete answers to what the 23 basis was for her action if she is going to 24 say anything like that. 25 MR. CALIHAN: Brian, would you say</p>
<p style="text-align: right;">Page 87</p> <p>1 W. Eber 2 A. I didn't have to. 3 Q. Why do you say that? 4 A. I don't remember all the details 5 around it. There was a lot going on and I just 6 don't remember. I don't know that, you know, he 7 -- I don't remember. I may have talked to Mike 8 Gumaer the attorney. I don't remember. 9 Q. Are you referring to Mike Gumaer as 10 the attorney or are you referring to another 11 attorney and Mike Gumaer? 12 A. I don't remember all the attorneys 13 involved, that were involved specifically. I mean 14 I did talk to Mike about these notes. He 15 definitely. 16 MR. CALIHAN: Don't disclose any legal 17 -- 18 MR. BROOK: She is absolutely allowed 19 to do that. 20 MR. RAMSEY: Well, there is either two 21 hats. There is a lawyer hat and there is a 22 non-lawyer hat. So if you are asking about 23 the non-lawyer questions with Gumaer that's 24 one thing, but he also served -- 25 A. I saw him as the lawyer.</p>	<p style="text-align: right;">Page 89</p> <p>1 W. Eber 2 that again? 3 MR. BROOK: Just saying reserving 4 rights with respect to these instructions to 5 the witness not to answer questions when she 6 has already said what she thought and 7 appears to be relying on advice that she got 8 at the time. We don't have to litigate that 9 now. 10 MR. CALIHAN: Just to make sure there 11 is no misunderstanding, so your position is 12 is that testimony, that reliance constitutes 13 a waiver or that she can not raise it 14 without disclosing the underlying advice? 15 MR. BROOK: I think that if there is 16 going to be -- I don't know that that 17 testimony does, but if there is going to be 18 reliance on the assertion that she believed 19 at the time that she didn't have an 20 obligation to do so as far as purporting her 21 good faith and such, then that is 22 essentially the advice of counsel and it 23 does not constitute a waiver. 24 MR. CALIHAN: I will consider it and 25 get back to you after lunch.</p>

23 (Pages 86 - 89)

Richard Harris Hawks Jr.

August 20, 2018

1

1 UNITED STATES DISTRICT COURT

Page 1

2 SOUTHERN DISTRICT OF NEW YORK

3 _____/

4 DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS,

5 Plaintiffs,

6 - v -

7 LESTER EBER; ALEXBAY, LLC f/k/a
8 LESTER EBER; LLC; CANANDAIGUA NATIONAL
9 CORPORATION d/b/a CANANDAIGUA NATIONAL
10 BANK & TRUST; ELLIOT W. GUMAER, JR.;
11 EBER BROS. & CO., INC.; EBER BROS. WINE AND
LIQUOR CORPORATION; EBER BROS. WINE &
LIQUOR METRO, INC.; EBER-CONNECTICUT, LLC ; and WENDY
EBER,

12 Defendants.

13 _____/

14

15 Examination Before Trial of Richard Harris
16 Hawks Jr., held at 700 Crossroads Building, 2 State
17 Street, Rochester New York 14614, on August 20, 2018
18 at a time of 9:00 a.m.

19

20

21

22

23

24

25 REPORTED BY: ASHLEY FALCONE

Richard Hawks Hays II
August 20, 2018

2 to 5

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2			2		
3	BRIAN BROOK, ESQ.,		3	WITNESS:	EXAMINED BY:
4	Clinton Brook & Peed,		4	-----	PAGE
5	100 Church Street, 8th Floor,		5	Richard Hawks	Brian Brook
6	New York, New York 10007.		6		6
7	Counsel for Plaintiffs Daniel Kleeberg,		7		Colin Ramsey
8	Lisa Stein, and Audrey Hays		8		119
9			9		Robert Calihan
10	COLIN RAMSEY, ESQ.,		10		153
11	PAUL KENEALLY, ESQ.,		11		
12	Underberg & Kessler LLP,		12		
13	300 Bausch & Lomb Place,		13		
14	Rochester, New York 14604.		14		
15	Counsel for Eber Defendants		15		
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18	Calihan Law PLLC,		18		
19	The Powers Building, Suite 761		19		
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21	Rochester, New York 14614		21		
22	Counsel for Defendant Mike Gumaer		22		
23			23		
24			24		
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		Page 3			Page 5
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2			2		
3	DONALD O'BRIEN, JR., ESQ.,		3	EXHIBIT	
4	700 Crossroads Building		4	NUMBER	DESCRIPTION
5	2 State Street		5	-----	PAGE
6	Rochester, New York 14614		6	PLF. 1	e-mail
7	Counsel for the Defendant Canandaigua		7	PLF. 2	e-mail
8	National Corporation d/b/a Canandaigua		8	PLF. 3	Letter
9	National Bank & Trust		9	PLF. 4	Letter
10			10	PLF. 5	Letter
11	Patrick Martin		11	PLF. 6	File of documents
12	Co-executor of Gumaer Estate		12	PLF. 7	e-mail
13			13	PLF. 8	Affidavit
14			14	PLF. 9	e-mail
15	* * *		15		
16			16		* * *
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<p style="text-align: right;">Page 6</p> <p>1 (It is hereby stipulated and agreed by 2 and among counsel that sealing, certification, and 3 filing are waived; and that all objections, except as 4 to the form of the question, are reserved until the 5 time of trial.)</p> <p>6 MR. O'BRIEN: Well, we probably need to 7 clarify what that is, I do want the witness to be 8 able to read and sign. 9</p> <p>10 RICHARD HARRIS HAWKS J 11 R., 6483 Cooks Point Road Naples, New York, 14512, 12 after having been duly called and sworn, testified as 13 follows:</p> <p>14</p> <p>15 EXAMINATION BY MR. BROOK:</p> <p>16 Q. Good morning. Would you please provide your 17 home and business address?</p> <p>18 A. My home address is 6483 Cooks Point Road Naples, 19 New York, and my work address is 72 South Main 20 Street, Canandaigua, New York.</p> <p>21 Q. And you're aware you are being deposed in the 22 matter of Kleeberg v. Eber, is that right?</p> <p>23 A. Yes.</p> <p>24 Q. Have you ever been deposed before?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 8</p> <p>1 another one that drives them crazy. So, to the best 2 of you're ability if you're answering in the 3 affirmative, give yes, or correct, and so on. Do you 4 understand that?</p> <p>5 A. Yes.</p> <p>6 Q. Another difference between a typical 7 conversation and today, that your answers are under 8 oath and you understand what that means, correct?</p> <p>9 A. Yes.</p> <p>10 Q. Now, if I ask a question and you answer it, I'm 11 going to assume that you understood my question. So, 12 if there's something in my question that you don't 13 understand, it's important you let me know, okay?</p> <p>14 A. Yes.</p> <p>15 Q. And another thing that may happen from time to 16 time, is there may be objections from Counsel here, 17 and unlike what you see on TV, there's no Judge here 18 to rule on these sort of things, so unless you're 19 instructed not to answer a question, if you're able 20 to answer the question, and you understand it, please 21 proceed to do so, do you understand that?</p> <p>22 A. I understand that, yes.</p> <p>23 Q. Now, is there any reason such as being under 24 unusual stresses, or physical or a mental condition, 25 or being under the influence of any substances, that</p>
<p style="text-align: right;">Page 7</p> <p>1 Q. How many times?</p> <p>2 A. About three times.</p> <p>3 Q. When was the last time you were deposed?</p> <p>4 A. Probably 15 years ago.</p> <p>5 Q. Okay. Now, I'm sure you have discussed this 6 with your lawyer, but I'm going to go over a few of 7 the basics of how this is going to work. In this 8 deposition I'm going to be asking you questions, and 9 you're going to be answering them under oath, do you 10 understand that?</p> <p>11 A. Yes.</p> <p>12 Q. And there are a few differences between a 13 deposition and a typical conversation that I want to 14 make sure you are aware of, and these are not easy to 15 remember, not as easy as it sounds. First, the Court 16 Reporter is attempting to transcribe everything you 17 say. So, in a normal conversation you might know 18 where I'm going with a question before I finish it 19 and go ahead and answer, or we might end up talking 20 over each other, we need to do our best to try to 21 avoid that. Do you understand that?</p> <p>22 A. Yes.</p> <p>23 Q. And another difference is that since this is an 24 oral transcription, the Court Reporter cannot 25 indicate head nods or other gestures or um-hum is</p>	<p style="text-align: right;">Page 9</p> <p>1 would prevent or limit your ability to testify today 2 fully and truthfully?</p> <p>3 A. There is no limitation.</p> <p>4 Q. I'm going to do a few general background 5 questions, standard stuff, but I have to go through 6 it so -- have you ever been arrested?</p> <p>7 A. No.</p> <p>8 Q. Have you ever been --</p> <p>9 A. You mean a traffic ticket?</p> <p>10 Q. No, arrested meaning put in the clink overnight.</p> <p>11 A. No.</p> <p>12 Q. Okay. Have you ever testified under oath in any 13 proceeding besides the three depositions you just 14 mentioned?</p> <p>15 A. No.</p> <p>16 Q. Have you been a party to a Court case?</p> <p>17 A. No.</p> <p>18 Q. Are you represented by Counsel here today?</p> <p>19 A. Yes.</p> <p>20 Q. And who's that Counsel?</p> <p>21 A. Dan O'Brien.</p> <p>22 Q. And does Dan O'Brien represent you individually, 23 or Canandaigua National Bank?</p> <p>24 A. He represents the organization that I work for.</p> <p>25 Q. And without telling me anything about your</p>

Richard Hargrave III
August 20, 2018

42 to 45

<p style="text-align: right;">Page 42</p> <p>1 BY MR. BROOK:</p> <p>2 Q. But not in his individual capacity. I'm not 3 asking you to say what other people may have done, do 4 you understand that?</p> <p>5 A. Yes.</p> <p>6 Q. To your knowledge did anyone else from 7 Canandaigua National Bank ever review any 8 transactions that any Eber Brothers' entity was 9 involved in?</p> <p>10 MR. O'BRIEN: In the trust side?</p> <p>11 MR. BROOK: In the trust side, yes.</p> <p>12 MR. O'BRIEN: Okay.</p> <p>13 A. Not in the trust side.</p> <p>14 Q. Now, on the commercial lending side, was there 15 involvement by Canandaigua National Bank in reviewing 16 transactions that Eber Brothers was engaged with 17 there?</p> <p>18 A. I believe there were -- I was not aware of them.</p> <p>19 MR CALIHAN: I'm sorry, read the question 20 back again.</p> <p>21 (Read back Page 42, Lines 14 to 17.)</p> <p>22 Q. Now, when I use the term transaction, do you 23 understand the term transaction to include a loan?</p> <p>24 A. Yes.</p> <p>25 Q. When did you first meet Lester Eber?</p>	<p style="text-align: right;">Page 44</p> <p>1 Q. So, you knew that Mr. Gumaer was a lawyer at 2 Nixon Hargrave, correct?</p> <p>3 A. Yes.</p> <p>4 Q. Do you know when he retired?</p> <p>5 A. No.</p> <p>6 Q. Approximately when was his retirement?</p> <p>7 MR. CALIHAN: Objection to form.</p> <p>8 MR. O'BRIEN: He said he didn't know.</p> <p>9 A. I don't know.</p> <p>10 Q. Do you know if he was retired at the time he 11 contacted you -- let me withdraw. Was Mr. Gumaer 12 still practicing law at Nixon Hargrave, to the best 13 of your knowledge, at the time when you and he first 14 discussed the Allen Eber trust?</p> <p>15 A. I believe so.</p> <p>16 Q. Are you aware that at some point Mr. Gumaer 17 relocated to Georgia and to Massachusetts for most of 18 the year?</p> <p>19 A. Yes.</p> <p>20 Q. Approximately when was that?</p> <p>21 A. That was shortly after we took the relationship 22 over, so it had to be 2007 or 2008.</p> <p>23 Q. And what was Mr. Gumaer's role in connection 24 with the Allen Eber trust?</p> <p>25 A. He was a co-trustee.</p>
<p style="text-align: right;">Page 43</p> <p>1 A. When did I first meet him?</p> <p>2 Q. Yes.</p> <p>3 A. Shortly after our assuming the relationship, 4 which would have been probably early 2007.</p> <p>5 Q. And who in connection with Eber Brothers, or the 6 Allen Eber trust, did you communicate with about 7 assuming the relationship before you actually did so?</p> <p>8 A. It would have been probably Lester Eber and 9 probably Elliot Gumaer.</p> <p>10 Q. Now, Elliot, he also goes by Mike?</p> <p>11 A. Mike, yes.</p> <p>12 Q. How did you refer to him?</p> <p>13 A. Mike, most of the time.</p> <p>14 Q. When did you first meet him?</p> <p>15 A. I was aware of Mr. Gumaer years before that in 16 his capacity of working with the law firm Nixon 17 Peabody, Nixon Hargrave at the time.</p> <p>18 Q. And have you personally interacted with him?</p> <p>19 A. Not personally, professionally in other trust 20 relationships.</p> <p>21 Q. Okay. So, just making sure I understand. So, 22 this is not a situation like with Lester where you 23 had heard about him just because of his reputation, 24 you had actually worked with Mr. Gumaer, correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. Did he have any the role that you were aware of?</p> <p>2 MR. RAMSEY: Form.</p> <p>3 MR. CALIHAN: Objection as to form.</p> <p>4 A. The form or -- excuse me. The other role might 5 have been an advisor to the Eber family, to the Eber 6 relationship.</p> <p>7 Q. And what do you mean by advisor?</p> <p>8 A. I believe he was handling various legal 9 activities and affairs.</p> <p>10 Q. And for which members of the Eber family was he 11 handling various legal matters and affairs?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 MR. CALIHAN: Form.</p> <p>14 A. My understanding that it was for the Eber 15 Corporation, and in some cases maybe Lester 16 personally.</p> <p>17 Q. And was it significant to you in terms of how 18 you dealt with the trust's responsibility that Mr. 19 Gumaer might be representing Lester Eber personally?</p> <p>20 MR. CALIHAN: Objection to form.</p> <p>21 A. It became a concern because of the conflict.</p> <p>22 Q. What do you mean by the conflict?</p> <p>23 A. Well, in handling being a co-trustees with us, 24 and then also handling certain legal activities for 25 the Corporation.</p>

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1

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X *

5 DANIEL KLEEBERG, LISA STEIN and *
6 AUDREY HAYS, *

7 PLAINTIFFS, *

8 VS *

9 * INDEX NO:
10 LESTER EBER, ALEXBAY, LLC f/k/a * 16-CV-9517
11 LESTER EBER, LLC, CANANDAIGUA * LAK
12 NATIONAL CORPORATION d/b/a *
13 CANANDAIGUA NATIONAL BANK & TRUST, *
14 THE ESTATE OF ELLIOT W. GUMAER, *
15 JR., EBER BROS & CO, INC, EBER *
16 BROS, WINE AND LIQUOR CORPORATION, *
17 EBER BROS WINE & LIQUOR METRO, * VOL II
18 INC, EBER-CONNECTICUT, LLC and *
19 WENDY EBER, *

20

21 DEFENDANTS. *

22 -----X *

23

24 Deposition of RICHARD HARRIS HAWKS, JR
25 Rochester, New York
26 Thursday, April 11, 2019

27

28 Reported by:

29 Mary Agnes Drury, RPR, NYACR, CLR
30 JOB NO. 158944

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1 RICHARD HARRIS HAWKS, JR
 2 that prohibited the combination of the trust --
 3 the trust and lending sides?

4 A. I cannot give you specific
 5 situations.

6 Q. Has CNB ever brought an action on
 7 behalf of a trust that it managed against a
 8 co-trustee in court?

9 A. Not to my knowledge.

10 Q. Going back to 2012, and when you
 11 learned about the Eber-Connecticut transfer;
 12 you described how there was a -- I believe, a
 13 phone conversation, and then a brief meeting;
 14 is that right, or was it just one phone
 15 conversation?

16 A. It was a phone conversation, and
 17 then -- we're talking about the same meeting;
 18 it would have been with Mike Gumaer, and
 19 Lester, and Wendy, and then we went into a
 20 short trustees meeting, which -- at which time
 21 we discussed the annual distribution and where
 22 that was going to be funded from.

23 Q. Okay. So was the phone
 24 conversation, was that the first time that you
 25 were made aware that there was anything going

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1 RICHARD HARRIS HAWKS, JR
 2 on with the transfer of the Eber-Connecticut
 3 business?

4 A. It was a quick, brief review of that
 5 information where different sub-corporations
 6 were listed as -- where we were looking to
 7 transfer certain assets over to it.

8 Q. Okay. So at the time of that phone
 9 conversation, were you aware that the proposed
 10 transfer or transfer that had either had
 11 occurred or was about to occur, involved
 12 transferring the Connecticut business to an
 13 entity that was outside the trust?

14 A. At that point, we were not aware
 15 that it was an entity outside of the trust; it
 16 was a transfer of restricted promissory notes.

17 Q. Okay. So are you talking about a
 18 meeting in 2011, when you ratified promissory
 19 notes that had already been issued?

20 A. Yes.

21 Q. Okay. And so I'm talking about
 22 later, after that.

23 At some point you became aware that
 24 the Eber-Connecticut business had been
 25 transferred out of the trusts --

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1 RICHARD HARRIS HAWKS, JR
 2 MR. O'BRIEN: Form.
 3 MR. BROOK: -- assets, correct?
 4 THE WITNESS: Yes, we did become
 5 aware of that.

6 BY MR. BROOK:

7 Q. Okay. And how did you become aware
 8 of that; was it a phone conversation or email
 9 or --

10 A. Through review of some of the
 11 documents that we had seen, and part of the
 12 meeting notes from a meeting in 2012, I believe
 13 it was.

14 Q. Okay. And by that point, had the
 15 transfer already occurred, or was it something
 16 that was just being contemplated?

17 A. I believe it had already been
 18 transferred.

19 Q. Okay. So --

20 A. I --

21 Q. -- you testified earlier that you
 22 recall CNB being asked to ratify that
 23 transaction, or were you talking about the
 24 loans?

25 A. I'm talking about the loans.

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1 RICHARD HARRIS HAWKS, JR
 2 Q. Was CNB ever asked to ratify the
 3 transfer of Eber-Connecticut to Alexbay?

4 A. Not to my knowledge.

5 Q. Did CNB ever ratify that
 6 transaction?

7 A. I don't believe so.

8 Q. Did you ever discuss the
 9 Eber-Connecticut transfer with Mike Gumaer?

10 A. Yes, when it was recognized that he
 11 had -- excuse me, that this transfer had
 12 occurred, and he had recommended that this --
 13 that the transfer was appropriate to do for the
 14 continuation of the company.

15 Q. Okay. So Mike -- what do you
 16 specifically recall Mike saying? You said he
 17 recommended that it occur?

18 A. He recommended, and through
 19 discussions that he and Lester had had in
 20 helping to manage the company, that this was in
 21 the best interest of the company at that time.

22 Q. So was it your understanding, based
 23 on that conversation that Mike Gumaer had
 24 actually suggested the course of conduct or
 25 that he had just approved it after the fact?

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1 RICHARD HARRIS HAWKS, JR

2 A. I'm not sure if he was the architect
 3 or put it together. I know he was directly
 4 involved with helping run the business for a
 5 number of years, and was winding down, but this
 6 was a suggested transaction to protect the
 7 assets of the corporation.

8 Q. What was your understanding as to
 9 who or what the assets of the corporation were
 10 being protected from?

11 A. The transfers here being protected
 12 to preserve what value there might have been.

13 Q. Preserve it from what? What was the
 14 concern about it, the assets being in the
 15 existing location where they had been?

16 MR. CALIHAN: Form.

17 THE WITNESS: The concern might have
 18 been for the ability to be able to continue
 19 to run what was now the Connecticut
 20 subsidiary, and the need to have
 21 appropriate funding over there.

22 BY MR. BROOK:

23 Q. So I'm still not sure I'm
 24 understanding.

25 So what -- what was it that you were

Page 267

1 RICHARD HARRIS HAWKS, JR

2 told about the problems that Eber-Connecticut
 3 was facing with getting funding in its current
 4 corporate structure, prior to being transferred
 5 to Alexbay?

6 A. What was I told --

7 Q. Yes.

8 A. -- about that?

9 It was indicated that there had been
 10 previous funding that had taken place, that it
 11 came directly from one of the shareholders who
 12 was -- happened to be Lester. And that the
 13 transfer here was to allow for capitalization
 14 or providing capital for Eber-Connecticut to be
 15 operating.

16 Q. So was it your understanding that
 17 Lester was providing additional capital to
 18 Eber-Connecticut?

19 A. It was my understanding that the
 20 capital that would have been provided here, he
 21 was not providing additional capital, he was
 22 looking to take some of the assets from the
 23 parent corporation to Connecticut, to relieve
 24 certain lending obligations and so forth, that
 25 he had previously made to the company.

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1 RICHARD HARRIS HAWKS, JR

2 Q. Okay. So in other words, Lester was
 3 looking to convert his debt position with the
 4 company where he loaned money to it, into a
 5 capital or equity position where he was an
 6 owner of the company; is that right?

7 A. It appeared that, yes.

8 Q. And was there any discussion about
 9 whether Lester could do that, given his role as
 10 co-trustee of the trust?

11 A. Through the discussion with Mike,
 12 Lester, and the bank as the co-trustees, we had
 13 reviewed that. But, once again, Mike had
 14 assured that, you know, as far as the
 15 corporation was concerned, this was in the best
 16 interest.

17 We were not assured at that point
 18 and did not find out until later that this was
 19 going to mean that Lester was going to become a
 20 major shareholder or the sole shareholder of
 21 the Connecticut.

22 Q. Did you ever have a one-on-one
 23 discussion with Mike Gumaer where neither
 24 Lester, nor Wendy were part of the conversation
 25 about --

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1 RICHARD HARRIS HAWKS, JR

2 A. From time-to-time, we would have
 3 been, but it was direct phone calls, where
 4 Lester, it may not have been available to
 5 discuss the annual distribution.

6 Q. Did you ever discuss during a
 7 one-on-one discussion with Mike Gumaer the Eber
 8 Connecticut transfer?

9 A. No.

10 Q. Why not?

11 MR. O'BRIEN: If you know.

12 THE WITNESS: Huh?

13 MR. O'BRIEN: If you know.

14 MR. BROOK: You don't have to do
 15 that.

16 MR. O'BRIEN: No. No. You asked
 17 him why not; and that also requires him to
 18 speculate as to what Mike Gumaer may have
 19 been thinking or what Lester may have been
 20 thinking.

21 BY MR. BROOK:

22 Q. I'm asking for your recollection as
 23 to why you didn't try to have a one-on-one
 24 conversation with Mike Gumaer?

25 A. We believed that Mike had been the

<p style="text-align: center;">Page 278</p> <p>1 RICHARD HARRIS HAWKS, JR 2 Brothers stock? How to account for the value 3 of the Eber Brothers stock? 4 A. How to account for it? 5 Q. Yeah. 6 A. With Wendy -- 7 MR. O'BRIEN: It requires a "yes" or 8 "no" answer, okay. 9 Q. The answer is "yes"?" 10 A. Yes. 11 Q. Who do you recall talking to about 12 that? 13 A. Both Wendy and Lester. 14 Q. In sum and substance, what was the 15 conversation that you had with Wendy or Lester 16 on that topic? 17 A. Basically, the sum of it would be 18 where are financial statements that we can use, 19 current financial statements to use to do or to 20 have a valuation done. 21 Q. Okay. So it was less about what the 22 value is; it was more following up on this 23 request for additional financial information? 24 A. Right. 25 Q. At some point were you provided with</p>	<p style="text-align: center;">Page 279</p> <p>1 RICHARD HARRIS HAWKS, JR 2 additional financial information? 3 A. No. 4 MR. RAMSEY: I might have one or two 5 follow-ups, but you go, just in the 6 interest of time. 7 EXAMINATION BY 8 MR. CALIHAN: 9 Q. Very quickly. I'm not sure I heard 10 you completely, but you testified to the effect 11 that there was some issue of Mr. Gumaer signing 12 the petition for the dissolution of the trust. 13 What was your understanding of that 14 issue? 15 A. My understanding was there was an 16 issue of competency at the time. 17 Q. When's the last time you had direct 18 contact with Mike Gumaer? 19 A. Probably in the late 2014 timeframe. 20 Q. And did he appear competent to you 21 at that time or already starting to suffer from 22 some debilitation? 23 A. My conversation would have been he 24 was a little disoriented. And when I made 25 contact, his wife answered the phone and</p>
<p style="text-align: center;">Page 280</p> <p>1 RICHARD HARRIS HAWKS, JR 2 indicated to me that he was not having a good 3 day. 4 Q. Okay. Had you been told before 5 that, that Mike was having health problems? 6 A. Somewhat, yes. 7 Q. Okay. Were you surprised by your 8 exchange with Mrs. Gumaer when she answered the 9 phone? 10 A. Yes. 11 Q. Okay. Did you try to have any 12 conversations with Mr. Gumaer after that 13 conversation? 14 A. We -- the conversation would be by 15 either letter or our annual statement would go 16 out to him; and I'm assuming that he received 17 it. But I also found out later that there was 18 a -- someone who was representing him. 19 Q. And who was that? 20 A. I believe it was Pat Martin, at the 21 time. 22 Q. Did you raise with anyone, any 23 concerns about Mr. Gumaer's competency at any 24 time? 25 A. No, I did not.</p>	<p style="text-align: center;">Page 281</p> <p>1 RICHARD HARRIS HAWKS, JR 2 Q. Okay. Did you think that it was an 3 obligation of yours, if you had concerns about 4 the competency of a co-trustee, to raise those 5 concerns? 6 A. In retrospect, yes, okay. However, 7 because of the statute and the ability and 8 respect that we have for individuals here, we 9 looked to hopefully have this play out. 10 Q. Okay. It's a difficult thing to do, 11 is it not? 12 A. Yes. Yes. 13 Q. You had known Mike Gumaer for some 14 time? 15 A. I had known of him for some time, 16 yes. 17 Q. And you testified earlier about 18 relying on Mike Gumaer in connection with the 19 appropriateness of the transfer involving 20 Eber-Connecticut. 21 Do you recall that? 22 A. Yes. 23 Q. And I think you had testified 24 earlier; although, I may be confusing two 25 deposition days, about Mike, in your view,</p>

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1 RICHARD HARRIS HAWKS, JR
 2 wearing two hats sometimes as a lawyer and as a
 3 trustee?
 4 A. Yes.
 5 Q. And when you were relying on
 6 Mr. Gumaer with respect to the Eber-Connecticut
 7 transaction, did you understand that he was
 8 functioning as a -- as a lawyer or as a
 9 trustee?
 10 A. I understood he was --
 11 MR. BROOK: Objection to form.
 12 THE WITNESS: -- he was functioning
 13 in both capacities.
 14 Q. And when you say as a lawyer or you
 15 answered my question as a lawyer; as a lawyer
 16 for whom?
 17 A. A lawyer for the Eber Brothers
 18 business.
 19 Q. Okay. And did you view then that he
 20 was in a conflict position when he was
 21 providing that advice?
 22 A. Yes. Yes. And that would have
 23 referred us then to go back to our conflict of
 24 interest policy.
 25 Q. And did you do that?

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1 RICHARD HARRIS HAWKS, JR
 2 A. Nothing in writing from him.
 3 Q. Okay. Did you ever inform any of
 4 the beneficiaries about the Harris Beach
 5 fraudulent action -- strike that.
 6 Did you ever inform any of the Eber
 7 Trust beneficiaries of the Harris Beach
 8 fraudulent transfer action?
 9 A. I did not.
 10 Q. Okay.
 11 MR. CALIHAN: Those are all the
 12 questions I have. Thank you.
 13 MR. BROOK: All right. Well, I do
 14 have a few matters for follow-up, and I
 15 appreciate everyone sticking around for
 16 this.
 17 EXAMINATION BY
 18 MR. BROOK:
 19 Q. So I'm going to show you what was
 20 previously marked as Plaintiffs' Exhibit 47.
 21 (Whereupon, Plaintiffs' Exhibit 47,
 22 Gumaer Letter, Dated 1/2/01, Bates Stamped
 23 EB-0001556 to '1557, 2-Pages was previously
 24 marked for identification.)
 25 MR. O'BRIEN: Do you have a copy?

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1 RICHARD HARRIS HAWKS, JR
 2 A. We did, and we reviewed that with
 3 our counsel.
 4 Q. And did you get a clean bill of
 5 health in connection with relying on
 6 Mr. Gumaer, as you testified?
 7 MR. BROOK: Objection to form.
 8 THE WITNESS: It was deemed that his
 9 competence at that point was sufficient.
 10 Q. Was sufficient?
 11 A. Yes.
 12 Q. That his competence was sufficient.
 13 You're talking now about competence
 14 or conflict of interest?
 15 A. His confidence -- or the conflict of
 16 interest was not a major issue for us at that
 17 time.
 18 Q. All right. Do you recall with
 19 specificity, anything that Mike Gumaer said to
 20 you or in your presence regarding the
 21 Eber-Connecticut transaction?
 22 A. No, I do not recall any specific.
 23 Q. Okay. Do you recall anything in
 24 writing that you received from him with respect
 25 to the Eber-Connecticut transaction?

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1 RICHARD HARRIS HAWKS, JR
 2 MR. BROOK: Unfortunately, I don't.
 3 It is the engagement letter between Mike
 4 Gumaer and Lester Eber.
 5 MR. O'BRIEN: You say 47?
 6 MR. BROOK: Yes.
 7 BY MR. BROOK:
 8 Q. If you could, please.
 9 That letter is dated January of
 10 2001, which I know is well before you got
 11 involved or Canandaigua National Bank got
 12 involved with the trust.
 13 Is that a letter that you recall
 14 ever seeing in terms of Mike Gumaer's tension,
 15 as trustee, lawyer, and director of the Eber
 16 companies.
 17 MR. CALIHAN: Objection to form.
 18 THE WITNESS: I do not recall seeing
 19 it.
 20 Q. Are you aware of how Mike Gumaer was
 21 being compensated for his work as either
 22 trustee, director, or lawyer?
 23 A. I was not aware of how he was being
 24 compensated. I did know that neither Lester
 25 nor Mike Gumaer were taking any kind of a

Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CIVIL ACTION NO. 16-cv-951 (LAK)

4 DANIEL KLEEBERG, et al.,

5 Plaintiffs,

6 v.

7 LESTER EBER, et al.,

8 Defendants.

9 -----x

10 98 Southeast 7th Street

11 Suite 1100

12 Miami, Florida

13 Thursday, May 9, 2019

14 9:35 a.m.- 11:55 a.m.

15

16

17

18 DEPOSITION OF SOUTHERN GLAZER'S WINE & SPIRITS, LLC
19 THROUGH LEE HAGER

20

21

22 Taken before Edward Varkonyi, Registered
23 Merit Reporter and Notary Public for the State of
24 Florida at Large, pursuant to Notice of Taking
25 Deposition filed in the above cause.

	Page 2	Page 4
<p>1 APPEARANCES 2 BRIAN BROOK, ESQ., 3 Brook & Associates PLLC 4 100 Church Street, 8th Floor 5 New York, New York 10007 6 on behalf of the Plaintiffs.</p> <p>7 COLIN D. RAMSEY, ESQ., 8 Underberg & Kessler LLP 9 50 Fountain Plaza, Suite 320 10 Buffalo, New York 14202 11 on behalf of Defendants Lester Eber, 12 Alexbay, LLC f/k/a Lester Eber, LLC 13 Eber Brothers & Co., Inc., Eber Bros. Wine 14 and Liquor Corporation, Eber Bros. Wine and 15 Liquor Metro, Inc., Eber Connecticut, LLC, 16 and Wendy Eber</p> <p>17 JOHN HERBERT, ESQ. (Telephonically) 18 P.O. Box 1031 19 Tiburone, California 94920 20 on behalf of Defendants Lester Eber and 21 Wendy Eber</p> <p>22 DAVID P. ACKERMAN, ESQ., 23 Akerman LLP 24 777 S. Flagler Drive West 25 Palm Beach, Florida 33401 on behalf of the Witness.</p> <p>26 ROBERT B. CALIHAN, ESQ., 27 Calihan Law PLLC 28 16 Main Street 29 Rochester, New York 14614 30 on behalf of Defendant Estate of Elliot W. 31 Gumaer</p> <p>32 ALSO PRESENT: Alan Greenspan, Esq., 33 Executive VP and General Counsel 34 Southern Glazer's Wine and Spirits</p>	<p>1 Thereupon-- 2 LEE HAGER 3 was called as a witness by the Plaintiff and having 4 been first duly sworn responded as follows: 5 THE WITNESS: Yes, I do. 6 DIRECT EXAMINATION 7 BY MR. BROOK: 8 Q. Good morning. 9 A. Good morning. 10 Q. Could you please state your full name. 11 A. Lee F. Hager. 12 Q. And you are aware you're being deposed in 13 the case of Kleeberg versus Lester Eber? 14 A. Yes. 15 Q. And you are here as a corporate 16 representative for Southern Glazer's Wine and Spirits 17 of America, LLC; is that correct? 18 A. Yes. 19 Q. Did I get that name, right? 20 A. Yes. 21 Q. Okay. Is it fair to say that that is 22 a -- that that entity can be referred to herein as 23 just generally Southern, and that would include that 24 entity and also its predecessors and affiliates? 25 A. Yes.</p>	
<p>1 I N D E X 2 Witness Direct Cross Red. Rec. 3 LEE HAGER 4 78 83 --</p> <p>4 5 6 7 E X H I B I T S 8 Plaintiffs For Ident. 9 Exhibit 92 Subpoena 8 10 Exhibit 93 SGWS-000124 to 138 19 11 Exhibit 94 EB-00035524 to 43 58 12 Exhibit 95 Restrictive Covenant EB-644 to 652 63 13 Exhibit 96 EB-688 to 691 75 14 15 16 17 18 19 NOTE: THE ORIGINAL EXHIBITS WERE RETAINED BY MR. 20 BROOK AND ARE NOT ATTACHED TO THE TRANSCRIPT. 21 22 23 24 25</p>	Page 3	<p>1 Q. Have you ever been deposed before? 2 A. Yes. 3 Q. How many times? 4 A. I would have to say three, four times. 5 Q. When was the last time you were deposed? 6 A. Approximately two years ago. 7 Q. Even though you probably discussed these 8 sorts of things with your lawyers and I don't want to 9 know specific advice or anything that was given 10 there, I'm just going to go over some of the ground 11 rules generally. 12 In this deposition I'm going to be asking 13 you questions and you're going to be answering them 14 under oath. You understand that? 15 A. Yes. 16 Q. And there is a few differences between a 17 deposition and a typical conversation that I want to 18 make sure we remain conscious of. 19 First, the court reporter is trying to 20 transcribe everything that we say and if he doesn't 21 put it in the transcript, it might as well not have 22 been said. So that means it's important for us to 23 try our best not to speak over each other. Do you 24 understand that? 25 A. Yes.</p>

2 (Pages 2 - 5)

<p style="text-align: right;">Page 18</p> <p>1 in terms of what an acquisition deal might look like?</p> <p>2 A. Well, you know, you skipped a big part,</p> <p>3 as I remember this.</p> <p>4 The substantive discussions in '05</p> <p>5 related to the Delaware and the Ohio acquisitions or</p> <p>6 mergers into the business -- let's call it</p> <p>7 acquisitions into our business.</p> <p>8 Prior to that -- just so we're all on the</p> <p>9 same page, prior to that the New York operations had</p> <p>10 already, from my standpoint, ceased to exist.</p> <p>11 Q. Let's just step back for one second. We</p> <p>12 might be off on the timing here and that could be the</p> <p>13 source of confusion.</p> <p>14 A. Yeah, I'm a little confused.</p> <p>15 Q. So how long was it between the time when</p> <p>16 you started talking about acquiring Ohio and Delaware</p> <p>17 interests and that transaction actually being</p> <p>18 consummated, a matter of months, weeks?</p> <p>19 A. It was rapid. I would have to say you</p> <p>20 could measure it in weeks. Now, if it was six weeks</p> <p>21 or eight weeks, it happened -- it happened rather</p> <p>22 quickly. It was the summer of '05, I remember,</p> <p>23 because it was a lost summer for me. It was the</p> <p>24 summer of '05 when this transaction all came</p> <p>25 together. Yeah. '07?</p>	<p style="text-align: right;">Page 20</p> <p>1 Q. Let's jump back in time a little bit to</p> <p>2 before this.</p> <p>3 Prior to the discussions that immediately</p> <p>4 preceded the letter of intent, had there been any</p> <p>5 substantive discussions about an acquisition of Eber</p> <p>6 Brothers in either '05 or '06?</p> <p>7 A. No.</p> <p>8 Q. So was there only one previous discussion</p> <p>9 with Lester Eber about a potential acquisition?</p> <p>10 A. To the best of my knowledge, yes.</p> <p>11 Q. Who participated in that discussion?</p> <p>12 A. It would have been myself and Mr. Chaplin</p> <p>13 at that time. Wayne Chaplin had it. Possibly Harvey</p> <p>14 Chaplin at the initial one about joining forces with</p> <p>15 us. I am referring to that early one now in that --</p> <p>16 right after we entered the state.</p> <p>17 Q. In that early discussion had it been</p> <p>18 conveyed to Lester Eber that he would have a</p> <p>19 continuing role in the business if Eber Brothers was</p> <p>20 acquired?</p> <p>21 MR. RAMSEY: Form.</p> <p>22 THE WITNESS: Excuse me?</p> <p>23 BY MR. BROOK:</p> <p>24 Q. Sometimes when a company is acquired the</p> <p>25 existing management goes, sometimes it stays. During</p>
<p style="text-align: right;">Page 19</p> <p>1 Q. Let's look at an exhibit.</p> <p>2 MR. ACKERMAN: Look at a document.</p> <p>3 MR. BROOK: Let's mark this as 93.</p> <p>4 THE WITNESS: Excuse me, it was the</p> <p>5 summer of '07. Excuse me, summer of '07.</p> <p>6 MR. BROOK: Let's mark this Exhibit 93.</p> <p>7 MR. ACKERMAN: You may want to clarify</p> <p>8 the prior answers.</p> <p>9 THE WITNESS: Yeah.</p> <p>10 (The document referred to was thereupon</p> <p>11 marked Plaintiff's Exhibit 93 for Identification, a</p> <p>12 copy of which is not attached hereto.)</p> <p>13 BY MR. BROOK:</p> <p>14 Q. Do you recognize what has been marked as</p> <p>15 Exhibit 93?</p> <p>16 A. Yes.</p> <p>17 Q. What is it?</p> <p>18 A. This was our -- what I will say is our</p> <p>19 initial letter of intent regarding the -- yeah, this</p> <p>20 is our initial letter of intent regarding the</p> <p>21 purchase of the New York operation.</p> <p>22 Q. Okay. So that was -- it's dated March</p> <p>23 2007, and February 2007, looks like there is a few</p> <p>24 amendments?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 21</p> <p>1 those initial discussions with Lester Eber, was it</p> <p>2 contemplated by Southern that Lester Eber would</p> <p>3 continue on in a senior role with the New York</p> <p>4 operations if Southern acquired Eber Brothers?</p> <p>5 A. It was never really our intentions for</p> <p>6 Lester to have a long-term role, and especially that</p> <p>7 of an employee.</p> <p>8 We really kind of looked at it as being,</p> <p>9 you know, we have done this before as a consultant as</p> <p>10 a transition for our business, you know, ways of</p> <p>11 working.</p> <p>12 We did realize very, very early on when</p> <p>13 we started in New York, we had a fairly good</p> <p>14 understanding about metro, we thought, and then we</p> <p>15 had an awful lot to learn about metro and we had very</p> <p>16 little understanding about the ways of working in</p> <p>17 upstate New York, which to me should be a different</p> <p>18 state.</p> <p>19 It's just a totally different way of</p> <p>20 working, customer, supplier preference. Everything</p> <p>21 is just totally different and we realized our initial</p> <p>22 fore up there and going up there when we did was</p> <p>23 without knowledgeable source, so we really believed</p> <p>24 that we needed to have a transition with it. I think</p> <p>25 it was always anticipated that there would be some</p>

<p style="text-align: right;">Page 22</p> <p>1 sort of consultive role.</p> <p>2 Q. And in terms of a consulting role, was 3 that meant to be more limited than the role of say 4 someone who was actually managing the operation 5 itself?</p> <p>6 A. A hundred percent. We already had -- we 7 already moved at kind of great thought and expense 8 what we thought at that time was our future 9 leadership up there, both on the commercial point and 10 operational point but, again, through years of 11 expansion, acquisition, we realized that sending the 12 best minds to a foreign country where they couldn't 13 speak the language was never going to be successful.</p> <p>14 So the answer to that question is, you 15 know, we had, we thought, the core of the nucleus of 16 the commercial people now in place, but needed to 17 really have some knowledge given to them.</p> <p>18 Q. So when Southern moved into other states, 19 not counting New York, was it typical business 20 practice to acquire a local distributor?</p> <p>21 A. I would have to say it's not only 22 Southern's, but it's probably the industry's way of 23 doing it because of the regulations, the laws and 24 whatever.</p> <p>25 No wholesaler will ever go up and just</p>	<p style="text-align: right;">Page 24</p> <p>1 very top and the very, very bottom.</p> <p>2 Q. You made a gesture there. Were you 3 suggesting that if you kept the middle or higher 4 executive people around, that they might butt heads 5 with Southern management?</p> <p>6 A. No, my gesture was my figure of speech. 7 I have some European blood in me.</p> <p>8 Q. I was trying to understand.</p> <p>9 A. Nothing was not spoken.</p> <p>10 Q. Okay. Who initially proposed -- when it 11 came to Southern acquiring Eber and its assets, who 12 first proposed that Lester Eber have a consulting 13 role?</p> <p>14 A. I would very much like to say it was a 15 joint -- for us it was almost like it was a part of 16 our all our deals, as I have said.</p> <p>17 It wasn't like one person proposed it. 18 It was almost accepted. So as we sit down, as say 19 this executive group, and I would represent mostly 20 organizationally from my point as being secretary of 21 the company in charge of all the back office and all 22 the administration, and then there would be our 23 salespeople or administrative people. It's almost a 24 natural thing, you know, to benefit us.</p> <p>25 It wasn't one. It was almost like it was</p>
<p style="text-align: right;">Page 23</p> <p>1 plant their flag because, you know, a wholesaler owns 2 nothing. They have to have the brands. They have to 3 have the distribution rights. They have to have 4 employees. You very, very rarely go to what people 5 typically say is green field. No, that's a -- that's 6 a very costly and long route to go.</p> <p>7 Q. And in those typical situations where a 8 local distributor was acquired in a new state, what 9 typically happened to the existing management of 10 those companies that were acquired?</p> <p>11 A. If we were successful in charming the old 12 owners, which are traditionally family owned, very 13 prideful people, we were successful in getting some 14 sort of transition plan and it varies. You know, 15 some sort of -- like I might say, consulting, 16 advisory, whatever it might want to be. Yes, that 17 would be part of our game plan.</p> <p>18 Q. Then for more junior employees like 19 salespeople, was it typically your goal to retain 20 them as employees?</p> <p>21 A. Yeah, quite contrary you want to keep the 22 continuity of the people that are selling and making 23 money for you and it's usually those middle executive 24 managers are the ones that have chances of being 25 either replaced or reorganized. So it's the very,</p>	<p style="text-align: right;">Page 25</p> <p>1 our challenge to get -- again, to me it's all 2 business continuity. It's all long term for me, 3 short term/long term.</p> <p>4 Q. Were the terms of the consulting 5 arrangement negotiated?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 THE WITNESS: Am I supposed to answer 8 that?</p> <p>9 MR. ACKERMAN: Yes.</p> <p>10 THE WITNESS: As in all of them, they 11 were made as broad as possible for my advantage, 12 you know, giving me the ability to expand or 13 contract as my business was going to progress.</p> <p>14 You know, no insult to Mr. Eber in this 15 room, to us it was very, very typical to 16 negotiate as broad as you can and then utilize 17 the services and the knowledge as they became 18 needed.</p> <p>19 BY MR. BROOK:</p> <p>20 Q. How was the amount of the consulting fee 21 determined?</p> <p>22 A. Again, from experience for what we had 23 expected, to -- again, being way now in advance and 24 being up there now a couple of years before, two, 25 three years from '04 to this period of '07 when the</p>

<p style="text-align: right;">Page 26</p> <p>1 consulting agreement was actually done, we had 2 learned a lot, but probably from my standpoint, being 3 critical like I am, we learned so much that we did 4 not know that, you know, from my standpoint, you 5 know, I just saw this agreement replacing other sort 6 of consultants that I would have had to hire, be them 7 operational consultants, be them industry 8 consultants, be them lobbyists in their things. 9 This is one of the things that maybe 10 doing these transactions I saw Lester, Mr. Eber, as 11 almost like a one stop shop of knowledge of a lot of 12 different things that I was going to have to 13 purchase, you know, in the marketplace. 14 It was -- again, we thought it was fair 15 and we thought it was arm's length and we thought it 16 was equitable from our standpoint. We would have 17 spent a lot more trying to buy these services some 18 other place. 19 Q. And who was negotiating the consulting 20 agreement on behalf of Lester Eber? Was it just him 21 or did he have someone else negotiating for him? 22 MR. RAMSEY: Form. 23 THE WITNESS: I don't remember. I don't 24 really remember. I know that they had a very 25 large law firm.</p>	<p style="text-align: right;">Page 28</p> <p>1 A. Uh-huh. 2 Q. That's a yes? 3 A. Yes. Excuse me. 4 Q. And it refers to in the first item 5 purchasing the value of the inventory. Do you see 6 that? 7 A. Yes, sir. 8 Q. Not necessarily specific to this letter 9 of intent, but do you know was the inventory of Eber 10 Brothers ultimately acquired by Southern? 11 A. Yes. 12 Q. Was all the inventory acquired by 13 Southern or was some of it not able to be agreed upon 14 as to the amount of the price? 15 A. I would have to say substantially all of 16 the inventory. We would not have bought things we 17 didn't feel we can represent. We would not have 18 bought unsaleable or unmarketable merchandise and we 19 wouldn't have bought oddball things that we would 20 have to just write down or write off. So we would 21 have bought saleable, marketable merchandise. 22 Q. Do you recall there being any oddball 23 things that couldn't be bought? 24 A. There always is. There always is but I 25 don't recollect. It would be a de minimis amount in</p>
<p style="text-align: right;">Page 27</p> <p>1 Any discussions about any of the work 2 product that came out of that -- I'm sure Lester 3 had the right attorneys working with him. Any 4 discussions about things -- you know, like any 5 sort of consulting agreement, we pushed what we 6 wanted and they pushed back. 7 I don't really think it was Lester 8 pushing back but his attorneys. I'm sure he had 9 counsel. 10 BY MR. BROOK: 11 Q. Does the name Harris Beach ring a bell? 12 A. Yeah, they were pretty good. Yeah. 13 Harris Beach, yeah. 14 Q. I want to ask you a couple of questions 15 about this Exhibit 93. Do you have that in front of 16 you still? 17 A. Yes. 18 Q. If you could, please, turn to the page 19 that has the Bates number in the bottom right ending 20 in 130. It's about halfway in. 21 A. Okay. 22 Q. Are you there? 23 A. 130, yes, sir. 24 Q. There section 2 specifies a purchase 25 price for the assets. Do you see that?</p>	<p style="text-align: right;">Page 29</p> <p>1 any wholesaler's operation. 2 Q. And the third item under 2, it says \$10 3 million for the intangible assets that have been 4 listed and I think it's on the preceding page. 5 Was that amount ultimately paid or was 6 that amount changed? 7 A. I believe that amount was ultimately 8 changed. I believe that was like a placeholder as 9 this -- as this transaction evolved from amendment to 10 amendment to amendment. So I would have to say at 11 this point it was a placeholder. 12 Q. How was that amount changed? Did it go 13 up or down? 14 A. I can't tell you now exactly. 15 Q. Please turn to the next page. 16 A. Uh-huh. 17 Q. It says in the first full paragraph 18 there: "At closing Southern shall pay Eber in cash 19 the purchase price less, (i), an amount to be 20 allocated to the restrictive covenants." 21 Do you see that? 22 A. Uh-huh. 23 Q. What was the amount being referred to 24 there? 25 A. I don't specifically recollect what</p>

<p>1 amount that was.</p> <p>2 Q. Is it typical to enter into restrictive 3 covenants with companies when you are acquiring their 4 assets?</p> <p>5 A. Absolutely.</p> <p>6 Q. If you look at, I believe it's the next 7 page, section 5.</p> <p>8 It says "Eber, you", and I will note for 9 the record that this letter is addressed to Lester 10 Eber.</p> <p>11 It says: "Eber, you, and each of the 12 current shareholders, owners and affiliates of both 13 EBWLC and Eber NDC will enter into restrictive 14 covenants." Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. Do you know why -- let me start back. 17 Was this requirement for numerous restrictive 18 covenants, including one with EBWLC, is something 19 that remained part of the deal or was changed before 20 it was ultimately finalized?</p> <p>21 A. I believe there were restrictive 22 covenants right through all the transactions, 23 including the -- the consulting agreement I believe 24 also had a restrictive covenant in it.</p> <p>25 You know, when we were coming in and</p>	<p>Page 30</p> <p>1 Q. Can you think of any reason why Southern 2 would have agreed not to impose a restrictive 3 covenant on EBWLC or other Eber entities?</p> <p>4 MR. CALIHAN: Objection to form.</p> <p>5 MR. RAMSEY: Form.</p> <p>6 THE WITNESS: I would have no idea.</p> <p>7 BY MR. BROOK:</p> <p>8 Q. Why did you want to have a restrictive 9 covenant with Lester Eber specifically?</p> <p>10 A. Well, again, as we learned a lot we 11 learned that the -- we made the right decision, first 12 of all, by trying to make a deal with Lester and the 13 Eber companies because their reputation really did 14 precede itself and had created this business image 15 that was counter to what I will say the other 16 competition was, the big competition, our 17 competition.</p> <p>18 So if you use that as the foundation and 19 again, we have learned now, we were there for a few 20 years, we said we don't want this guy or any of his 21 companies in any format coming back and competing 22 with us.</p> <p>23 Q. Turning to section 6, that describes how 24 Lester Eber will enter into a consulting agreement. 25 Do you see that?</p>
<p>1 paying substantial amounts of a money to a business, 2 for a business we want to make sure that this 3 business and the key people don't resurrect 4 themselves and start competing with us.</p> <p>5 Q. It is fair to say you understand that 6 EBWLC, Eber Brothers Wine and Liquor Corporation, was 7 the parent company that had a number of affiliates, 8 including an entity that operated in the metro area 9 and interests in Ohio and Delaware?</p> <p>10 A. I never had a full understanding of the 11 full organizational structure, so I can't say yes to 12 that question.</p> <p>13 I know that they were all interrelated. 14 I had no idea of what the ownership was of each of 15 them or if they were individually owned or owned 16 separately.</p> <p>17 Q. Do you know why no restrictive covenant 18 was ultimately entered into between EBWLC and 19 Southern?</p> <p>20 A. I have no idea, but I would like to 21 clarify that. I have no idea if there really was one 22 or the there wasn't one entered into.</p> <p>23 Q. So if there was one not entered into you 24 don't know why that wouldn't be the case?</p> <p>25 A. Absolutely not, no.</p>	<p>Page 31</p> <p>1 A. Uh-huh.</p> <p>2 Q. That's a yes?</p> <p>3 A. Yes. Excuse me.</p> <p>4 Q. And it says in item B the annual 5 compensation will be \$500,000. Do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. How was that amount determined?</p> <p>8 A. The same -- I'll repeat the same answer. 9 We're into this state -- we're in this state now 10 since '04, very weak still in upstate, many needs and 11 we truly assessed what we would have to spend for 12 these resources and knowledge that, you know, we 13 valued. We valued in entering an agreement with 14 Lester.</p> <p>15 Q. Was the amount of compensation ultimately 16 agreed to be paid to Lester Eber higher than the 17 \$500,000 reflected in this letter of intent?</p> <p>18 A. Yes.</p> <p>19 Q. Why did the amount increase?</p> <p>20 A. You know, that's an excellent question 21 and I think the answer is is that when this part of 22 the transaction was first envisioned, this was kind 23 of like a New York-centric part of the deal, you 24 know.</p> <p>25 As it evolved -- as it really evolved, it</p>

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<p style="text-align: right;">Page 34</p> <p>1 became a much larger deal, so I believe the 2 consulting here of \$500,000 was really before it 3 evolved into buying the other operations in Ohio and 4 Delaware and we had fully, fully expected to and 5 assumed that we would have to be using Lester on a 6 broader scale as it came.</p> <p>7 So I believe the \$500,000 in the final 8 iteration of this went to a number like \$600,000 and 9 we believe we got the best -- from the business 10 standpoint, it wasn't New York-centric. Now we had 11 other states that we were going to use Lester in.</p> <p>12 Q. And did Lester ultimately provide 13 consulting services outside of New York?</p> <p>14 A. On a limited basis. On a limited basis 15 in a transition role.</p> <p>16 Q. For approximately how long did he provide 17 consulting services outside of New York?</p> <p>18 A. I would have to say -- I don't really 19 recollect because we -- the structure of each of his 20 other deals like this -- we had like, for instance, 21 Postiy in Ohio. We kind of relied on what we found 22 when we got there, is knowing what you don't know.</p> <p>23 We found when we got there they had a 24 relatively good management group there so we didn't 25 really have to rely as much on Lester because it's</p>	<p style="text-align: right;">Page 36</p> <p>1 the way. 2 Some of it is what we learned after we 3 bought the business and when we were fortunate enough 4 to get some of the key middle management people and 5 senior people into our organization, we quickly 6 figured out that they were sheerly commercial 7 people. 8 They had absolutely -- they kind of 9 understood the inside of the New York business really 10 pretty well, which is important, don't get me wrong, 11 but they had no knowledge of the outside part of the 12 business, what I will call the operational part for 13 us which is very, very, very important, because we're 14 such a heavily regulated industry and we do nothing 15 without somebody yelling at us or fining us. 16 You know, they had no knowledge, the 17 salespeople we hired, so we had this gap of 18 institutional upstate New York knowledge that covered 19 everything from people to operations, to ways of 20 working, to legislative affairs to -- you know, there 21 is this group called the SLA, I call them something 22 else, which is the State Liquor Authority, which 23 heavily regulates us. 24 That in itself is -- the old statement 25 dealing with city hall, it's ten times worse. They</p>
<p style="text-align: right;">Page 35</p> <p>1 simplicity of the business also, mostly a brokerage 2 business and in Delaware one of Lester's partners, 3 again, very smart from our standpoint, eventually and 4 still to this date is our landlord, you know, of the 5 building, a gentleman by the name of Ed Stegmeir.</p> <p>6 Having that continuity of Lester Eber in 7 our stable of consultants having his partner -- 8 ex-partner in the marketplace just made for a good 9 transition.</p> <p>10 Q. Did Southern retain Ed Stegmeir?</p> <p>11 A. No, I don't believe -- maybe for a short 12 period. I don't really remember. Again, he's our 13 landlord.</p> <p>14 Q. And he wants you to be able to pay the 15 rent?</p> <p>16 A. He wants us to be able to pay the rent, 17 in a terrible building.</p> <p>18 Q. He won't see that.</p> <p>19 A. On a triple net lease. Yeah, please 20 don't let him see that.</p> <p>21 Q. With respect to Lester Eber, why did you 22 believe that he was qualified to provide the 23 consulting work that you needed?</p> <p>24 A. Well, some of it was some instinct. Some 25 of what we learned -- you ask me good questions, by</p>	<p style="text-align: right;">Page 37</p> <p>1 had no knowledge and we were -- we were under -- I 2 don't want to say under attack, but we needed that 3 knowledge. I would have to say we recognized the 4 value of our bargain after we bargained.</p> <p>5 Q. So at some point after the initial 6 bargaining was it specifically added to the 7 consulting relationship that Lester Eber would act on 8 interfacing with governmental affairs?</p> <p>9 A. Again, if I remember correctly we made 10 that consulting agreement as broad as we could and 11 then we threaded the needle as many times as we can 12 in terms of expanding it.</p> <p>13 Q. Was Southern expecting Lester to continue 14 doing work that was essentially the same kind of work 15 he had been doing when he had been in charge of Eber 16 Brothers?</p> <p>17 A. I don't know. I can only assume the work 18 that he did when he was in Eber Brothers. I can't 19 really answer that.</p> <p>20 I know what our intentions were for 21 Lester, you know.</p> <p>22 Q. So is it fair to say that you wanted 23 Lester to use the experience and skill that he had 24 acquired through Eber Brothers to help Southern?</p> <p>25 MR. RAMSEY: Form.</p>

10 (Pages 34 - 37)

<p style="text-align: right;">Page 38</p> <p>1 THE WITNESS: Well, I'm going to answer 2 it this way. We didn't want Lester to interfere 3 in our brand building and our selling ways. 4 We had far surpassed what Eber had done 5 in terms of what I will call marketplace sort of 6 things, sort of actions. 7 We utilized Lester for those issues that 8 were out of market, let's say, not necessarily 9 the business of the business of going into a 10 customer and selling them a bottle and have the 11 customer pay. We know how to do that. We know 12 how to do that really pretty well. It was all 13 the things, the environment that we did our 14 business in.</p> <p>15 BY MR. BROOK:</p> <p>16 Q. When it comes to having evaluated Lester 17 Eber and his qualifications to serve as a consultant, 18 were you made aware of the Eliot Spitzer 19 investigation into Eber Brothers and other 20 distributors that had occurred?</p> <p>21 A. Absolutely.</p> <p>22 Q. And what had been disclosed to you about 23 what Lester Eber and his company had been doing that 24 was being investigated?</p> <p>25 A. I'm going to look at my counsel because</p>	<p style="text-align: right;">Page 40</p> <p>1 A. Get it out. 2 Q. Have Lester Eber's responsibilities as a 3 consultant changed since the beginning in 2007 and 4 2008? 5 A. I would have -- what are the dates 6 again? 7 Q. At the beginning, in 2007/2008, what were 8 Lester Eber's day-to-day responsibilities for 9 Southern? 10 A. I guess, you know, I would describe it, 11 and I will go into as much detail as you want, in the 12 early days they were very broad, covered a lot of 13 different topics. 14 Now they're narrower but much deeper as 15 we matured as an organization and our needs became a 16 lot more finite. In the early days, and this comes 17 from my firsthand knowledge and my dealing with it, 18 it was everything from where our facility should be 19 placed, what do you know about this union workforce, 20 you know, what about the trading practices. 21 It was wide ranging in the beginning 22 because, as I described, the Eber personnel we hired 23 were salespeople, so I had no context on the 24 operations and the culture of upstate New York and I 25 relied tremendously on what I saw as a neutral source</p>
<p style="text-align: right;">Page 39</p> <p>1 we were also part of that investigation. Every 2 wholesaler was part of that investigation. 3 For those of us who are old enough to 4 know Mr. Spitzer, he did not discriminate. He went 5 after an industry, he did not go after an individual 6 and we were involved in it and I am not really 7 prepared to talk about that, those days. 8 MR. ACKERMAN: Just stick with the 9 question on what you knew about Mr. Eber's. 10 BY MR. BROOK:</p> <p>11 Q. I'm just staying focused on Mr. Eber. 12 A. Specifically I knew nothing about it. I 13 was dealing with Mr. Spitzer myself. 14 Q. So did Lester Eber disclose to Southern 15 that he had, in fact, authorized kickbacks?</p> <p>16 MR. RAMSEY: Form.</p> <p>17 THE WITNESS: To my knowledge, no. I 18 think every wholesaler was dealing with 19 Mr. Spitzer and their own issues. 20 It's Spitzer still alive?</p> <p>21 MR. RAMSEY: He's alive. I'm not sure 22 where he is, but he's alive.</p> <p>23 BY MR. BROOK:</p> <p>24 Q. So many jokes, so inappropriate for the 25 transcript.</p>	<p style="text-align: right;">Page 41</p> <p>1 to give me some advice. 2 So you go from the spectrum what I 3 describe as wide from hey, Lester, where do you 4 believe we should put our warehouse? Now, I went to 5 school in Buffalo, okay, so I know upstate New York 6 but I don't know upstate New York. 7 I loved it up there but I know that 8 Lester lived in Rochester, which I think is a little 9 bit east of Buffalo, if I remember correctly, but we 10 knew we had to close all the warehouses and have one 11 warehouse in the state and I basically -- I was going 12 to make my own decision, hey, Lester where do you 13 think we should put our pinpoint, so that's a good 14 example of a broad thing, but then let's get into the 15 wider thing. 16 I think what we were also seeing -- and 17 you raised the thing about Spitzer and regulations. 18 I think we found ourselves as a tremendous deficit, 19 both in Metro and upstate New York, in terms of what 20 I will call our legislative strength, our knowledge 21 of the politics of New York. 22 We do pretty well in Florida. We do 23 pretty well in Texas. In upstate New York, it's a 24 different world up there. It's like one union leader 25 said to me, I don't care what you do, this is New</p>

<p style="text-align: right;">Page 42</p> <p>1 York, we do it New York way, and that was the context 2 of everything that we tried to do in New York. 3 So I think an area that I personally 4 underestimated, but had really become the focal point 5 of what Lester does, forget the operations now, we 6 understand it. Forget about the people. Forget 7 about labor. I'm on top of that. I feel pretty good 8 that we're really pretty good.</p> <p>9 But what's gotten very deep, what hasn't 10 changed is the government affairs, it's the SLA 11 regulatory environment that's politically charged and 12 you cannot handicap, you know.</p> <p>13 I think those are really two, and I 14 believe that there is a point that no one 15 anticipated. We have tried to pivot ourselves in a 16 very socially responsible way and in effect used a 17 lot of our business arguments to have Lester try to 18 frame in the social consequence of the alcoholic 19 beverage industry in Albany.</p> <p>20 It's really now in that venue of 21 government affairs, lobbying, SLA regulatory that 22 Lester provides our organization the value. All that 23 other stuff we're running our business.</p> <p>24 Q. So was it your understanding that Lester 25 Eber had experience in dealing with some of these</p>	<p style="text-align: right;">Page 44</p> <p>1 basis. 2 If God forbid something happened to one 3 of our consultants, why would I want to be bound 4 to a corporation for consulting? These are 5 personal services. God forbid something 6 happens, again, to any one of these consultants, 7 their value is diminished. 8 No, I would never enter -- again, these 9 are personal services.</p> <p>10 BY MR. BROOK:</p> <p>11 Q. You were aware when you entered into the 12 consulting agreement with Lester, that Lester was 13 going to continue to manage a wine and liquor 14 distributorship in Connecticut and Rhode Island 15 potentially too, correct?</p> <p>16 A. Well, the answer is we passed on the 17 ability to buy those operations. We assessed the 18 value to our organization, so we passed on it and I 19 don't think -- by having the right to buy it and 20 passing on it, it was our assumption he was going to 21 continue it and, to be very honest, I have no idea 22 what went on in Connecticut right now, we're not in 23 Rhode Island right now, we never saw it as a creed to 24 our business. I don't even know if he has a business 25 there.</p>
<p style="text-align: right;">Page 43</p> <p>1 legislative matters? 2 A. Oh, absolutely. Absolutely. 3 Q. And he had that experience from his role 4 running the Eber Brothers company, correct? 5 A. Again, I don't know what he specifically 6 did when he ran the Eber companies in each of the 7 states. I don't, but it became very evident to our 8 people -- we're pretty experienced. 9 We didn't turn Lester loose without 10 watching Lester. Even though we have other lobbyists 11 and we have other people, you know, we began to see 12 when Lester walked the halls of Albany, it wasn't 13 Mr. Eber, it was Lester. 14 You know, again, we're pretty 15 sophisticated that the relationships drive good 16 business decisions. 17 Q. Was there a particular reason why the 18 consulting agreement was entered into with Lester 19 Eber personally rather than with Eber Brothers, the 20 company? 21 MR. RAMSEY: Form. 22 THE WITNESS: I can only answer that as 23 that it's a hundred percent typical that we 24 enter these things, you know, on what I will 25 describe as an individual and personal contract</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. Was it typical for -- you mentioned other 2 consulting agreements, those are personal contracts. 3 Can you think of any other instance where 4 there was a consulting contract with someone who was 5 a former executive of a company that Southern 6 acquired and that person continued to manage a wine 7 and liquor distributorship? 8 MR. RAMSEY: Form. 9 THE WITNESS: I have no recollection of 10 that. I really don't. 11 BY MR. BROOK: 12 Q. Is it fair to say that at least on 13 Southern's part -- I don't want to know what advice 14 was given, if there was any, but there was no 15 question raised about whether it would be legal for 16 Lester Eber to receive consulting payments directly 17 from Southern while continuing to be a manager of a 18 wine and liquor distributorship? 19 MR. RAMSEY: Form. 20 THE WITNESS: That's kind of like more of 21 a legal. I would imagine that as long there is 22 not a conflict of interest or conflict of duty 23 in his consulting that we would not have a 24 problem. There are a lot of consultants that 25 have a lot of other clients.</p>

12 (Pages 42 - 45)

<p style="text-align: right;">Page 46</p> <p>1 We were more focused on the business of 2 originally Ohio, Delaware and New York and that 3 would have been our focus. If he had other 4 relationships unrelated to us --</p> <p>5 BY MR. BROOK:</p> <p>6 Q. So when you say conflict of interest, you 7 are referring to interests or duties with respect to 8 Southern, right?</p> <p>9 You weren't concerned about whether he 10 would be breaching a duty to this other company?</p> <p>11 A. I wouldn't know.</p> <p>12 MR. RAMSEY: Form.</p> <p>13 THE WITNESS: I wouldn't know.</p> <p>14 BY MR. BROOK:</p> <p>15 Q. I was just trying to clarify.</p> <p>16 A. No, that's where I was going. I would 17 not know.</p> <p>18 MR. RAMSEY: Brian, is this a good spot 19 to take two minutes?</p> <p>20 MR. BROOK: Sure, we can do that.</p> <p>21 (Thereupon a brief recess was taken, 22 after which the following proceedings were had.)</p> <p>23 BY MR. BROOK:</p> <p>24 Q. I want to return to still looking at 25 Exhibit 93, same page. The provisions regarding the</p>	<p style="text-align: right;">Page 48</p> <p>1 We had really -- at this point, you know, 2 it was dating. There was nothing there, so we 3 wanted to have the ability as we ramped up our 4 own people or our own capabilities to say okay, 5 we don't need you to do this now. It was 6 control for me of the relationship.</p> <p>7 BY MR. BROOK:</p> <p>8 Q. So is it typical to have in these sorts 9 of acquisition situations a consulting agreement 10 where the consulting fee may be paid even though no 11 services are being rendered?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 THE WITNESS: It was never our intention 14 for doing it that way. Ours was to control the 15 relationship. We always envisioned a set or 16 subset, of when I describe wide versus narrow 17 and deep, that's what we -- eventually 18 happened.</p> <p>19 I don't know if we ordained it that way 20 or we just believed it but we thought the 21 relationship would continue and evolve. We 22 wanted to have control of it.</p> <p>23 BY MR. BROOK:</p> <p>24 Q. So the initial contract with Lester Eber 25 was for a five year period, correct?</p>
<p style="text-align: right;">Page 47</p> <p>1 consulting agreement, Section D, I want to look at 2 the last line there.</p> <p>3 It says: "Southern will have the right 4 to reduce or eliminate your duties, so long as full 5 payment described in 6(B) is made during the term." 6 Do you see that?</p> <p>7 A. Uh-huh.</p> <p>8 Q. Is that yes?</p> <p>9 A. Yes.</p> <p>10 Q. Why was that provision part of this 11 agreement?</p> <p>12 MR. ACKERMAN: Let me give you an 13 instruction. If that question calls upon you to 14 divulge the content of communications with 15 counsel, then I ask you to leave that out of 16 your answer.</p> <p>17 If you can otherwise answer that based 18 upon discussions with Mr. Eber or your own 19 thinking, you can answer that.</p> <p>20 THE WITNESS: Understood.</p> <p>21 MR. ACKERMAN: Thanks.</p> <p>22 THE WITNESS: Understood. I believe I 23 answered that previously, it gave us full 24 control of what we wanted Lester to do or not in 25 terms of our business.</p>	<p style="text-align: right;">Page 49</p> <p>1 A. Yes.</p> <p>2 Q. Then it also locked him up in terms of 3 the restrictive covenant for another five years after 4 that, correct?</p> <p>5 A. Yes.</p> <p>6 Q. After the initial five year period did 7 Southern enter into new consulting agreements with 8 Lester Eber so he would be paid more money after that 9 point?</p> <p>10 A. We negotiated with Lester. This initial 11 agreement, I believe this five year period ended in 12 2012. Yeah, from '07 to '12. Yes, we entered 13 negotiations with Lester and, again, I remember them 14 and we narrowed his responsibilities and we cut his 15 consultive pay down significantly.</p> <p>16 Q. What was the amount of pay that you 17 agreed on in 2012?</p> <p>18 A. I believe it was -- we cut him back 50 19 percent. I believe it went from a monthly of 50 on 20 the first agreement from the '07 to the '12 agreement 21 from 50, to 25 going forward.</p> <p>22 Q. Just so we're sure we're clear on the 23 record here, I'm going to show you what was 24 previously marked as Plaintiff's Exhibit 27.</p> <p>25 A. Uh-huh.</p>

13 (Pages 46 - 49)

<p style="text-align: right;">Page 50</p> <p>1 Q. I have a few copies here. 2 MR. ACKERMAN: Thank you. 3 BY MR. BROOK: 4 Q. Do you recognize this document? 5 A. Yes. 6 Q. Is this the consulting agreement that was 7 entered into in 2007 with Lester Eber? 8 A. Yes. 9 Q. When the consulting agreement was 10 renegotiated in 2012 was there any similar such 11 documentation prepared at that time? 12 A. At this point -- at this point we decided 13 it was better that it was a totally at will 14 agreement. 15 You know, again, for us it was to have 16 what we thought was control of the relationship. We 17 understood that he is still bound by the covenant 18 that he had, as long as it was mutually satisfactory 19 to us. 20 I know Mr. Eber is in the room so it's 21 little uncomfortable but we had already started to 22 build some resources to plan for the transition, you 23 know, of certain of the responsibilities, some work, 24 some hadn't worked. We wanted to have greater 25 control and not be bound long term by anything.</p>	<p style="text-align: right;">Page 52</p> <p>1 relationship? 2 A. No. 3 Q. Do you have any sense of what that number 4 might be ballpark? 5 A. I would just be speculating. I would 6 think some weeks it could be more, some weeks it 7 could be less. It was on call, on duty. 8 Q. Were there some weeks when there was no 9 work being done by Lester? 10 MR. RAMSEY: Form. 11 THE WITNESS: I could not say that. I 12 can't say that. 13 BY MR. BROOK: 14 Q. Who was involved in being the primary 15 interface with Lester Eber for his consulting duties? 16 A. On two levels I mentioned both names. On 17 a day-to-day level it would have been our general 18 manager, a gentleman who I mentioned, Mr. Larry 19 Goodrich. He was the primary leader of the 20 day-to-day of our entire New York State operation, 21 one of the people that I did speak to that I had 22 mentioned, and he would have worked very, very 23 closely with Lester in the early days of this -- of 24 the transaction moving right now almost until current 25 as -- as Mr. Goodrich's responsibilities are just</p>
<p style="text-align: right;">Page 51</p> <p>1 Q. Is that consulting relationship 2 continuing today? 3 A. Yes. 4 Q. Is it at the same amount of \$300,000 a 5 year? 6 A. Yes. 7 Q. And the restrictive covenant ended in 8 2017; is that correct? 9 A. It would have been -- yeah. Yes. 10 Q. So you have not sought to renew that 11 restrictive covenant? 12 A. No. 13 Q. Why not? 14 A. We're fully established. We believe that 15 any threat that we could have with Lester joining a 16 competition right now is negligible. 17 Again, we're fully established and 18 running our commercial business up there. 19 Q. You're aware that the consulting 20 agreement required up to 40 hours a week from Lester 21 Eber, correct? 22 A. Yes. 23 Q. Do you know how many hours a week on 24 average Lester Eber put in for Southern during the 25 initial five year period of the consulting</p>	<p style="text-align: right;">Page 53</p> <p>1 recently transitioning there will be another group of 2 leaders. 3 Q. Now, Lester Eber was given the role of 4 senior vice president or the title of senior vice 5 president, correct? 6 A. Uh-huh. Yes. 7 Q. Why was that? 8 A. More of a -- first of all, I've never 9 seen him use this title. I think it was more of a -- 10 how can I describe it? More of an ego introduction 11 sort of moniker for Lester to have. 12 Q. So was it in part so that he could wear 13 the hat of being an agent of Southern when he 14 interacted with third parties? 15 A. I think to the contrary. I think the 16 world knows Lester as a registered lobbyist and, you 17 know, I think that independence to us works to our 18 advantage. 19 I do believe, as I said, I don't ever 20 remember seeing Lester using that title. You know, I 21 can't really remember how it evolved from the 22 agreement or if it's actually really in place. 23 Q. As part of the consulting agreement 24 Lester Eber was entitled to reimbursement for 25 expenses, correct?</p>

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<p style="text-align: right;">Page 62</p> <p>1 believe that's the lobbying services fee that is paid 2 to Lester, yes.</p> <p>3 Q. So when did Lester first become a 4 lobbyist for Southern?</p> <p>5 A. I believe that it was somewhere when -- 6 again -- let me answer by just saying I am not 7 certain, but I believe it really came at this period 8 of time when he started to be without -- you know, 9 underneath the initial agreement, on the second one 10 and not necessarily -- but underneath the new 11 agreement.</p> <p>12 So I would have to say it probably is 13 around this period of time, but I would be 14 speculating.</p> <p>15 Q. And so this \$10,000 fee is paid in 16 addition to the \$300,000 consulting fee, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And how were those amounts determined, in 19 terms of the proportion for one versus the other?</p> <p>20 A. I'm not really certain. I'm not really 21 certain. I don't know but I have seen that amount as 22 a disclosed amount to the State of New York as a 23 lobbyist fee too, so it was a -- I have no idea. I 24 have no idea how that one was ascertained.</p> <p>25 Q. Has the State of New York been informed</p>	<p style="text-align: right;">Page 64</p> <p>1 addition to the one that appears in the consulting 2 agreement?</p> <p>3 A. No.</p> <p>4 Q. Can you think of any reason why that 5 might have been done?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 THE WITNESS: I don't know.</p> <p>8 BY MR. BROOK:</p> <p>9 Q. Going back to 2007 after the initial 10 letter of intent regarding the purchase of New York 11 assets, you mentioned that there were discussions and 12 ultimately acquisitions of some of Eber Brothers' 13 interests in other states. Specifically Delaware and 14 Ohio were acquired, correct?</p> <p>15 A. Correct.</p> <p>16 Q. And is it correct that there was also at 17 one point at least a preliminary agreement for 18 Southern to acquire a 15 percent stake in Eber 19 Connecticut?</p> <p>20 A. Yes.</p> <p>21 Q. What was the reason for that part of the 22 transaction?</p> <p>23 A. We wanted to -- there was two parts of 24 it. At that point in time, if I remember correctly, 25 we wanted as much security as we could for the monies</p>
<p style="text-align: right;">Page 63</p> <p>1 that Lester Eber is also receiving a consulting fee 2 of \$300,000 a year from Southern?</p> <p>3 A. I don't know. I don't know if that's a 4 required disclosure. If it was, I'm sure we did.</p> <p>5 Q. Let's go to a new exhibit. We will mark 6 this one 95.</p> <p>7 (The document referred to was thereupon 8 marked Plaintiff's Exhibit 95 for Identification, a 9 copy of which is not attached hereto.)</p> <p>10 BY MR. BROOK:</p> <p>11 Q. Do you recognize this document that's 12 been marked as Exhibit 95? I will just note for the 13 record it bears Bates numbers EB644 through 652.</p> <p>14 A. I don't remember seeing this.</p> <p>15 Q. Do you see it appears to be a restrictive 16 covenant entered into on the 30th day of November 17 2007 between Lester Eber and Southern Wine and 18 Spirits of America? Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. You are aware that there is a restrictive 21 covenant contained in the consulting agreement 22 between Lester and Southern, correct?</p> <p>23 A. Yes.</p> <p>24 Q. Do you know why there was a separate 25 restrictive covenant executed by Lester Eber in</p>	<p style="text-align: right;">Page 65</p> <p>1 that were being advanced to get it done and we saw 2 this was an asset that we could secure ourselves and, 3 as I believe I noted before, we had no idea what 15 4 percent of Connecticut meant. We had done no due 5 diligence. We had done nothing.</p> <p>6 Connecticut sounds like a nice state. We 7 really took it more as a -- what I will say as a 8 security interest for the deal and if it worked out 9 and made sense, which it didn't really make sense, we 10 would have gone forward.</p> <p>11 Q. So why did that part of the transaction 12 ultimately not go forward?</p> <p>13 A. We didn't see it really having a creed of 14 value. We don't really like -- not that we don't 15 like partners. We don't really do well with partners 16 long term and when you're a minority partner it often 17 doesn't work out right and 15 percent -- maybe I 18 could wince at 49 percent or 51 percent, but 15 19 percent is a weak partner, so we -- what we 20 understood, which was limited, we decided it wasn't 21 what we wanted to do.</p> <p>22 Q. Now, Southern, did it also agree to give 23 a loan to Eber Connecticut at some point or to 24 another Eber entity?</p> <p>25 A. There were a number of, I will call them</p>

<p style="text-align: right;">Page 66</p> <p>1 advances. There were a number of advances done to 2 what I can describe as keeping the Eber entities 3 themselves afloat while an orderly transaction was 4 being maintained.</p> <p>5 So one of -- one that I remember clearly 6 was with a trucking company where, you know, as we 7 understood it, we advanced money for this trucking 8 company. I'm not sure if it was a relationship. I 9 think it was called GT or GP Trucking or something 10 like that.</p> <p>11 Q. General Trucking Company?</p> <p>12 A. Yes, GT, where we advanced them money so 13 they don't repossess the trucks that would have ended 14 the business.</p> <p>15 It was -- you know, then we took that 16 advance, which -- we took that advance and we ended 17 up credited against the total purchase.</p> <p>18 Q. That was \$1.5 million that was advanced 19 early on after the letter of intent; does that sound 20 about right?</p> <p>21 A. Somewhere in that period of time, yes, 22 sir.</p> <p>23 Q. Were you made aware of how much Eber 24 Brothers had paid to acquire Slocum & Sons, the 25 Connecticut operation?</p>	<p style="text-align: right;">Page 68</p> <p>1 metro area through Southern? 2 A. That would be a bad thing. 3 Q. Why? Why do you say that? 4 A. Because it's one of the things that 5 protects our industry, is that, you know, you are 6 giving distribution rights for a particular area. 7 It's one of the biggest things that we 8 try to do, so it would be undermining the 9 distribution rights. Now, if they sell items that I 10 don't represent, that could be my competitor's 11 business. You know, first of all, if it was legal 12 it's one thing and number two, you know, if I knew he 13 was selling my products that I have distribution 14 rights for and traditionally contracted with the 15 supplier I would not take it lying down. I would go 16 tell the supplier.</p> <p>17 Q. Do you know who David Eber is?</p> <p>18 A. Yes.</p> <p>19 Q. Who is David Eber?</p> <p>20 A. No. Excuse me, I don't know David Eber. 21 No, I thought you were going to say David Taub. 22 Excuse me, I take that back.</p> <p>23 Q. So you don't know Lester Eber's son 24 David?</p> <p>25 A. No, I've never met David.</p>
<p style="text-align: right;">Page 67</p> <p>1 A. No, not I. I had no idea. 2 Q. So even though it wasn't consummated, at 3 one point there was an agreement of some sort for the 4 acquisition of 15 percent of Eber Connecticut in 5 exchange for \$3 million, correct? 6 A. We had the right or the option -- I'm not 7 sure if there is a difference between the two but we 8 had the right or the option to do Connecticut. 9 I personally, nor my team at that time, I 10 can't recollect doing any due diligence around that 11 transaction. I think us passing on it was more of a 12 did it make sense for us commercially and from 13 suppliers and customers to invest any money there. 14 Q. Are you aware that eventually that 15 15 percent interest was sold to another third party? 16 A. No. No. Again, I don't know whatever 17 happened in Connecticut or Rhode Island. 18 Q. Has Southern done business with Eber 19 Connecticut? 20 A. Not to my knowledge. Possibly wholesaler 21 to wholesaler if we have common suppliers but that's 22 100 percent speculation. It would all be normal 23 business if we did. I have no idea. 24 Q. Do you know whether Eber Connecticut has 25 imported wines that were then sold into the New York</p>	<p style="text-align: right;">Page 69</p> <p>1 Q. Do you know whether he was at some point 2 a Southern employee? 3 A. No, I have no idea. I have no idea. We 4 have 22,000 employees. 5 Q. So you don't know whether there were ever 6 discussions between David Eber and his father or 7 sister about having a business relationship between 8 Southern and some of the continuing Eber Brothers 9 entities? 10 MR. RAMSEY: Form. 11 THE WITNESS: Absolutely not. 12 BY MR. BROOK: 13 Q. If Lester as part of the consulting 14 agreement had told you that he would agree to all the 15 terms, but the money should be paid to another Eber 16 Brothers entity rather than to him personally, would 17 that have effected your willingness to enter into the 18 agreement? 19 MR. RAMSEY: Form. 20 THE WITNESS: The answer is, you know, 21 subject to whatever my attorneys might have 22 said, I would have objected vehemently. 23 From what I was told these are personal 24 services sort of agreements that Lester -- at 25 the end of the day we viewed Lester having the</p>

<p style="text-align: right;">Page 70</p> <p>1 value, not the older entity after they ceased -- 2 after they ceased to exist, so I would have been 3 a very -- I would think most of the people in my 4 executive team would have been the same way. 5 The answer is no. If that question was posed, 6 it's speculative, but I would answer it that 7 way.</p> <p>8 BY MR. BROOK:</p> <p>9 Q. What if the contract included a personal 10 services guarantee that the contract would only 11 continue so long as Lester Eber was able to provide 12 the services that were being contracted for?</p> <p>13 MR. RAMSEY: Form.</p> <p>14 THE WITNESS: Again, I would go to my 15 attorneys and say is this going to accomplish 16 what I want or not.</p> <p>17 BY MR. BROOK:</p> <p>18 Q. Let me ask you this way. As long as it 19 accomplished what you described that you wanted did 20 you care who ultimately got the money, as long as you 21 got what you wanted from Lester?</p> <p>22 MR. RAMSEY: Form.</p> <p>23 THE WITNESS: Call me myopic if you want, 24 after a business is done, it's done. We deal 25 with the individual.</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. Do you know whether Eber Brothers Wine 2 and Liquor Corporation continued to exist long after 3 it sold off its inventory and stopped as an operating 4 business?</p> <p>5 A. I have no idea what they have done 6 organizationally.</p> <p>7 Q. What was your understanding as to who the 8 owners were of Eber Brothers Wine and Liquor Corp.?</p> <p>9 A. I have no idea.</p> <p>10 Q. Were you aware that Lester was a trustee 11 of a trust that owned the Eber Brothers Wine and 12 Liquor Corp.?</p> <p>13 A. No.</p> <p>14 Q. Were you made aware of that as part of 15 your preparation for the testimony today?</p> <p>16 A. No.</p> <p>17 Q. You were aware that Eber Brothers Wine 18 and Liquor Corp. had pension liabilities, correct?</p> <p>19 A. We didn't -- we traditionally did not 20 assume pension liabilities. That's the black hole of 21 assumption.</p> <p>22 In the acquisitions that we have done in 23 the past -- I'm being specific. In multiple 24 acquisitions we have done to assume a pension 25 liability is very few and far between, especially in</p>
<p style="text-align: right;">Page 71</p> <p>1 It's kind of historically what we have 2 done and what we have known. When you work 3 through the halls of Albany they don't say hey, 4 mister, you know, Eber acquisitions. It's kind 5 of like a personal thing.</p> <p>6 We haven't given that up yet. I can't 7 answer your questions if because, you know, I'm 8 not an attorney. I'm the guy who has to run the 9 business and been basically taken advantage of 10 many times. This gray hair didn't come here 11 just naturally, so I know who I do business 12 with.</p> <p>13 BY MR. BROOK:</p> <p>14 Q. You said when business is done it's done 15 but as I mentioned before, and we have discussed, you 16 haven't had another situation where a consultant like 17 Lester for Southern has continued to operate a 18 business in some manner at the same time as he was 19 consulting with Southern, correct?</p> <p>20 A. To my recollection I never had a business 21 that competed with us in our same trading area. I 22 don't know if we have ever had a successor consultant 23 who might have been in the industry doing something 24 unrelated to us. I can't remember that. But within 25 our trading area, I really can't think of one.</p>	<p style="text-align: right;">Page 73</p> <p>1 certain states, like New York, where some of the 2 pension liabilities could be very big.</p> <p>3 Unless we can define them. Unless we can 4 really define them.</p> <p>5 Q. Do you know what happened in terms of 6 Eber Brothers' ability to pay its pension 7 liabilities?</p> <p>8 A. No. No.</p> <p>9 Q. Was Southern at some point in time in 10 2012 made a party to a civil action in New York 11 Supreme Court in connection with the transfer of 12 assets belonging to Eber Brothers Wine and Liquor 13 Corp.?</p> <p>14 A. In 2012?</p> <p>15 Q. Yes.</p> <p>16 A. The only -- the only real action that I 17 remember was when we were sued by Eber, Lester, the 18 company for, I think your word was poaching. My word 19 was more taking the employees coming to us. That's 20 the only action that I really remember.</p> <p>21 Q. So were you aware that at some point 22 Lester Eber had foreclosed on certain assets that 23 belonged to Eber Brothers Wine and Liquor Corp. and 24 had been required to name Southern as a party to that 25 action?</p>

Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

5 DANIEL KLEEBERG, LISA STEIN, AND
6 AUDREY HAYS,

7 Plaintiffs,

8 - vs -

9 LESTER EBER, ALEXBAY, LLC, F/K/A LESTER EBER, LLC,
10 ESTATE OF ELLIOT W. GUMAER, JR., AND WENDY EBER,

11 Defendants,

12 and

13 EBER BROTHERS & CO., INC., EBER BROS. WINE & LIQUOR
14 CORP., WINE & LIQUOR METRO, INC., EBER-CONNECTICUT, LLC,
15 EBER-RHODE ISLAND, LLC, EBER BROS. ACQUISITION CORP.,
16 EBER-METRO, LLC, SLOCUM & SONS OF MAINE, INC., AND
17 CANANDAIGUA NATIONAL BANK & TRUST COMPANY,

18 Nominal Defendants.

19 Deposition of FRANK TORCHIO, held pursuant to
20 Article 31 of the Civil Practice Law and Rules, at
21 Underberg and Kessler, 300 Bausch and Lomb Place,
22 Rochester, New York, on the 23rd day of August, 2019,
23 commencing at 9:30 a.m., before Leah Didsbury Reporter,
24 Notary Public.

	Page 2	Page 4
1 APPEARANCES:		1 COURT REPORTER: Do you want him to read and
2 BROOK & ASSOCIATES, PLLC		2 sign?
3 BY: BRIAN C. BROOK, ESQ.		3 MR. RAMSEY: Yes, please.
4 100 Church Street, 8th Floor		4 COURT REPORTER: Usual stipulations?
5 New York, New York 10007		5 MR. RAMSEY: Other than read and sign,
6 Appearng for the Plaintiffs		6 that's fine.
7 UNDERBERG & KESSLER, LLP		7 MR. BROOK: Actually, I don't as a matter
8 BY: COLIN D. RAMSEY, Esq.		8 of -- I've always been trained don't as a matter
9 50 Fountain Plaza, Suite 320		9 of what I've always been trained to do, agree to
10 Buffalo, New York 14202		10 usual stipulations, because it seems everywhere
11 cramsey@underbergkessler.com		11 usual stipulations means something different. I
12 Appearng for the Defendants		12 agree to the federal rules of civil procedure
13 CALIHAN LAW, PC		13 governing this deposition.
14 BY: ROBERT CALIHAN, ESQ.		14 MR. RAMSEY: That's fine.
15 620 Reynolds Arcade Building		15 (Whereupon, the following stipulations were entered into
16 16 East Main Street, Suite 620		16 by the respective parties.)
17 Rochester, New York 14614		17
18 rcalihan@calihanlaw.com		18 It is hereby stipulated by and between counsel for the
19 Appearng for the Gumaer Estate		19 respective parties that the oath of the referee is
20 WOODS, OVIATT, GILMAN		20 waived, filing and certification of the transcript are
21 BY: ERIN ELMOUJI, ESQ.		21 waived, and all objections, except as to the form of the
22 1900 Bausch and Lomb Place,		22 question, are reserved until the time of trial.
23 Rochester, New York 14604		23 FRANK TORCHIO,
24 eelmouji@woodsoviatt.com		24 of Rochester, New York, having been first duly sworn, was
25 Appearng for Canandaigua National Bank & Trust Company		25 examined and testified as follows:
	Page 3	Page 5
1 INDEX TO WITNESS		1 EXAMINATION BY MR. BROOK:
2	PAGE	2 Q. Good morning. This is not your first time
3 FRANK TORCHIO		3 being deposed, correct?
4 EXAMINATION BY MR. BROOK	5-200	4 A. Correct.
5		5 Q. Is there anything about how this deposition
6 INDEX TO EXHIBITS		6 works that you would like to go over before we begin?
7 (Retained by counsel)		7 A. I don't think so.
8 EXHIBITS DESCRIPTION PAGE		8 Q. When is the last time you were deposed?
9 Exhibit 126 Expert report 8		9 A. Let's see. I think it was in May of this year.
10 Exhibit 127 Glenn Liebman report 16		10 Q. All right. So if any issues come up, usually
11 Exhibit 128 Drawing 30		11 the biggest one is just talking over each other. I
12 Exhibit 129 Eder-Goodman transaction 41		12 sometimes am a little slow to get out my question. I am
13 Exhibit 130 Letter to Vincent DeBella 80		13 sure the court reporter will let us know, but that's just
14 from Wendy Eber		14 human nature. So what is your understanding of what this
15 Exhibit 131 Letter to Wendy Eber from 194		15 lawsuit is about?
16 Mike Gallagher		16 A. Well, my understanding of my involvement in
17 REQUESTS		17 this lawsuit is to valuation, principally of
18 DOCUMENT PAGE LINE		18 Eber-Connecticut, the operating company that is owned by
19 Bruner site 45 16		19 Eber-Metro, in turn owned by Eber Wine and Liquor.
20 Citations for number 174 10		20 Q. Or was owned by Eber Wine and Liquor, rather?
21		21 A. Sorry. That was correct. Was owned at that
22		22 time.
23		23 Q. And do you understand this lawsuit is largely
24		24 about whether the transfer of Eber-Metro from Eber Wine
25		25 and Liquor to Alexbay was a valid transaction?

2 (Pages 2 - 5)

<p style="text-align: right;">Page 70</p> <p>1 predicated on my valuation of Connecticut.</p> <p>2 Q. Right. I am just looking at your report</p> <p>3 Paragraph 1. I have been asked to provide an opinion</p> <p>4 regarding the market value of equity of the capital stock</p> <p>5 of Eber Brothers Wine and Liquor Metro, Inc. as of May</p> <p>6 23, 2012.</p> <p>7 A. Right.</p> <p>8 Q. But in your view, the work you were focused on</p> <p>9 was just the Eber-Connecticut asset; is that right?</p> <p>10 A. If you go further, I think I actually state</p> <p>11 this.</p> <p>12 Q. I don't think there is a dispute here. I am</p> <p>13 going to you know, I guess, what I am trying to</p> <p>14 understand a little better, you know, if you're really</p> <p>15 saying you were focused on Eber-Connecticut, then that</p> <p>16 would make sense as to why you did not spend much of your</p> <p>17 report analyzing the liabilities involved here.</p> <p>18 A. If you look at Paragraph 4, that puts my</p> <p>19 analysis in perspective. So it builds up from that</p> <p>20 valuation. That's the valuation.</p> <p>21 Q. Right.</p> <p>22 A. There is no operating asset at Metro. There is</p> <p>23 no operating asset at Wine and Liquor. The only</p> <p>24 operating asset is their ownership of Eber-Connecticut.</p> <p>25 So all the valuation work I did revolved around</p>	<p style="text-align: right;">Page 72</p> <p>1 then it must be some kind of legal stuff that's going on</p> <p>2 here that allows you to put a wedge between Wine and</p> <p>3 Liquor -- put a wedge between Wine and Liquor that</p> <p>4 ultimately puts a wedge between what the beneficiaries of</p> <p>5 the trust really own.</p> <p>6 Q. Right. I think -- let me help you put it in</p> <p>7 perspective here. So maybe we can have a more productive</p> <p>8 discussion. So Lester Eber foreclosed on debt that was</p> <p>9 owned by Eber-Metro and guaranteed by Eber Wine and</p> <p>10 Liquor. And the company agreed to just give him</p> <p>11 Eber-Metro. And eliminate the debt to Eber-Metro too, as</p> <p>12 a result. So there is a legal question certainly as to</p> <p>13 whether that was done for fair value. Did Lester Eber,</p> <p>14 given his fiduciary obligations and his various roles,</p> <p>15 get more value by acquiring Eber-Metro through the amount</p> <p>16 of his loans? And so that's why drawing this line here</p> <p>17 is fairly significant. And do you understand at least</p> <p>18 the general fact patterns as I described it?</p> <p>19 MR. RAMSEY: Form. Go ahead.</p> <p>20 A. I am trying.</p> <p>21 Q. So would you agree that if Eber-Metro did not</p> <p>22 have all of the liabilities for the pension and Harris</p> <p>23 Beach that you mentioned on this chart here, then the</p> <p>24 value of Eber-Metro would have been significantly higher</p> <p>25 than the 3.8 million dollars in debt that you listed here</p>
<p style="text-align: right;">Page 71</p> <p>1 Eber-Connecticut.</p> <p>2 Q. Right. And then -- but you also valued</p> <p>3 Eber-Metro and Eber Wine and Liquor to the extent that</p> <p>4 you said it was they were insolvent no matter what the</p> <p>5 value of Eber-Connecticut was, right?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 A. I wouldn't say it that way.</p> <p>8 Q. No matter which valuation of yours you used for</p> <p>9 Eber-Connecticut, right?</p> <p>10 A. My opinion is that the value of</p> <p>11 Eber-Connecticut was plus any other assets of Metro and</p> <p>12 Wine and Liquor were less than the liabilities.</p> <p>13 Q. And do you understand why it is that I am</p> <p>14 drawing a distinction between Eber-Metro and Eber</p> <p>15 Brothers Wine and Liquor for the liabilities?</p> <p>16 A. You know, I have a vague understanding that</p> <p>17 it's some kind of legal machination that's going on here.</p> <p>18 From my perspective as an economist, what I am looking at</p> <p>19 is what I think is relevant is what the heck is the value</p> <p>20 to these ultimate -- the beneficiaries of this trust.</p> <p>21 And in order to do that, you've got to go up the chain of</p> <p>22 command. Now, I understand there is some reason why it</p> <p>23 important to assess Metro vis-à-vis Wine and Liquor. I</p> <p>24 don't pretend to understand that. It doesn't make</p> <p>25 economic sense to me. If it doesn't make economic sense,</p>	<p style="text-align: right;">Page 73</p> <p>1 that was owed to Lester Eber?</p> <p>2 MR. RAMSEY: Form. Go ahead.</p> <p>3 A. When you say, "did not have", what do you mean</p> <p>4 by that?</p> <p>5 Q. Equal that it was not legally -- at the time of</p> <p>6 the transaction it was believed that Eber-Metro would not</p> <p>7 be liable for any of those debts.</p> <p>8 A. So --</p> <p>9 MR. CALIHAN: Objection.</p> <p>10 Q. Let me sort of give you my take on this. And I</p> <p>11 mentioned to you before in one of your questions my</p> <p>12 experience. And again, putting myself in the position of</p> <p>13 willing buyer with knowledge of all the relevant facts.</p> <p>14 I know from experience that when you try -- when you try</p> <p>15 to play a shell game with a PBGC about who was the</p> <p>16 controlling entity and who owns what and where does this</p> <p>17 liability set, you run an awful risk. I have seen it</p> <p>18 firsthand. I worked in the case called White</p> <p>19 Consolidate. That is not unlike this where the company</p> <p>20 itself tried to say this is not -- the pension is not our</p> <p>21 liability. It belongs to -- and they sold the company</p> <p>22 and without the liabilities. And did not have enough</p> <p>23 money to pay those liabilities. And said, well PBGC, you</p> <p>24 pick up the rest. And the PBGC said nuts to you. We're</p> <p>25 going after you. This is fraudulent conveyance. Now,</p>

<p style="text-align: right;">Page 74</p> <p>1 that kind of knowledge is the kind of thing that any 2 individual investor would reflect. So you can tell me 3 well, you know, legally I've got a legal opinion that 4 says this these pension obligations don't -- have nothing 5 to do with Eber-Metro. And I can -- I feel fairly 6 confident that had they sold Eber-Metro and the proceeds 7 were not enough to cover the amount of that pension, 8 either the PBGC is going to say you can't do this 9 transaction or in the case that I have seen, they go 10 after the buyer. And say well, now you bought this. 11 Those liabilities are now on your books and you have more 12 assets than what you just bought because you merged with 13 Connecticut. So now you're on the hook to pay those. 14 And, you know, again, these kinds of quote hidden 15 liabilities are the kind of things that are affected in 16 the ultimate purchase price even if one is -- if a 17 purchase price is offered because they're going -- a 18 buyer is going to price protect themselves. They're not 19 going to sit there and say, I got this great legal 20 opinion that is not going to be a problem. I can 21 separate the assets from this pension liability.</p> <p>22 Q. But what if it actually happened in this case?</p> <p>23 A. What if what actually happened?</p> <p>24 Q. What if the buyer in this case, Alexbay because 25 it bought it by giving up debt, actually believed that by</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. Are you sure that was the case in 2012? There 2 has been a number of elements of the law recently. 3 A. My involvement going back before 2012 -- I mean 4 look, I didn't -- I don't see anything that would 5 contradict that. The PBGC, as far as I can see, fight 6 like a dog when you try to hide, you know, or skirt and 7 force the PBGC to pay for or to be the trustee for 8 pension obligations. You know, you're in for a fight. I 9 guarantee that.</p> <p>10 Q. To what extent in connection with your work in 11 this case did you become familiar with the fight that 12 erupted between PBGC and the Eber entities?</p> <p>13 A. Well, you know, I familiarized myself with some 14 of the analysis that the PBGC did. And I think there was 15 a document that I saw that provided some kind of -- I 16 don't know. I guess call it a settlement of some kind. 17 I don't know if that's the right legal term. I read 18 those things.</p> <p>19 Q. For this chart, the summary of liabilities, did 20 you consider whether there was other obligors beyond 21 Eber-Metro and Eber Wine and Liquor for any of these 22 debts?</p> <p>23 MR. RAMSEY: Form.</p> <p>24 A. No. I don't specifically recall that.</p> <p>25 Q. Would that affect your analysis of the</p>
<p style="text-align: right;">Page 75</p> <p>1 engaging in this transaction it would acquire Eber-Metro 2 free and clear of pension obligations, would that be 3 relevant to your analysis?</p> <p>4 MR. RAMSEY: Form. Go ahead.</p> <p>5 A. No. Again, if you go back to that paragraph, I 6 am talking about a willing buyer aware of the facts. You 7 seem to be focused on what is kind of referred to as 8 specific investigators valuation as opposed to a fair 9 market value. Again, we seem to be flipping over into 10 the process as to why something was done and was it done 11 for legitimate reasons. I am out of that. That's not my 12 right here.</p> <p>13 Q. You have not made any opinion on whether in 14 this case because Lester Eber was a judiciary, his 15 opinion of the valuation would be relevant to this 16 litigation?</p> <p>17 MR. RAMSEY: Form.</p> <p>18 A. I don't know what the judge is going to 19 consider relevant or not relevant. I am telling you what 20 is relevant to my valuation is what I have done in this 21 report. You know, whether Lester thought that he could 22 skate on the PBGC, that's Lester's view. I am telling 23 you as a measure of fair market value under the 24 definition that I provided here an investor is going to 25 take into account those obligations for sure.</p>	<p style="text-align: right;">Page 77</p> <p>1 liabilities if there was a third obligor?</p> <p>2 MR. RAMSEY: Form.</p> <p>3 A. Possibly.</p> <p>4 Q. So are you aware of that after the Alexbay 5 transfer PBGC put a lien on Eber-Metro?</p> <p>6 A. Yes.</p> <p>7 Q. Are you aware that at the same time PBGC put a 8 lien on Eber-Connecticut?</p> <p>9 A. Yes. I think that is consistent with my view 10 of how the PBGC operates. They take fraudulent 11 conveyance very seriously. If they think you're trying 12 to escape, they're going to certainly at least do that.</p> <p>13 Q. So is it fair to say then that in addition to 14 Eber-Metro and Eber Wine and Liquor in your opinion 15 Eber-Connecticut was also an obligor for pension 16 liability?</p> <p>17 MR. RAMSEY: Form.</p> <p>18 A. Certainly from an investor's perspective that's 19 exactly what they are going to expect to happen.</p> <p>20 Q. Does it affect your ultimate valuation analysis 21 as to whether you put that liability in the 22 Eber-Connecticut analysis or further up the chain?</p> <p>23 A. So if the liabilities are at the 24 Eber-Connecticut level, that would reduce valuation for 25 Eber-Connecticut by the pension.</p>

<p>1 Q. Okay. But you did not do an analysis with 2 running the numbers in that way; is that right? 3 A. No. 4 Q. Do you think that you perhaps should have? 5 MR. RAMSEY: Form. 6 A. Well, I don't think -- it doesn't matter. So I 7 didn't -- it's kind of like a -- what is the point? The 8 solvency opinion has to do with Eber-Metro and Eber Wine 9 and Liquor. For I mean -- this gets back to what I said 10 before about the economics of it. I am still a little 11 fuzzy about why the hell it matters between Eber Wine and 12 Liquor and Eber-Metro. But notwithstanding, to me it 13 didn't really matter whether I put the liabilities of 14 Connecticut as long as they are there with Eber-Metro 15 when I am doing a solvency analysis of Eber-Metro that's 16 what counts. So it's like what's the point. 17 Q. So would you include the liabilities at each 18 level for the balance sheet of all three companies? 19 A. If the total liability is at Eber-Connecticut, 20 then I've accounted for the liability relative to 21 Eber-Metro. I netted it out against the Eber-Connecticut 22 assets. 23 Q. How do you decide where that goes? 24 A. As I said, it's difference. Not a distinction. 25 It doesn't matter to me. It's an economic matter. You</p>	<p>Page 78</p> <p>1 it really in your opinion appropriate to include that as 2 probable contingent liability? 3 A. That's not what I said. 4 Q. For Harris -- 5 A. I said that day follows night. If you tried to 6 separate the liabilities from the operating assets, 7 you're going to get fraudulent conveyance. An investor 8 is going to certainly reflect that. They will not say, 9 "I will roll the dice on this." No. These are serious 10 obligations. Particularly the PBGC and I would also 11 include the Teamsters in that. And the only point I 12 raise about the Harris Beach is that look, that's exactly 13 what an investor is going to anticipate. You try to hide 14 liabilities from the assets, and this is what you're 15 going to get. An investor knows that. You just can't 16 ignore that. You can't put blinders on and say this 17 doesn't matter. Yes, it matters. It matters a lot. 18 Particularly with a company for which the assets are less 19 than the liabilities, it matters a whole hell of a lot. 20 MR. RAMSEY: Take another five, Brian. 21 (Whereupon, Exhibit Number 130 was marked for 22 identification at this time.) 23 Q. Let's do one more document for now. So for the 24 record, I am showing you what's been previously marked as 25 Exhibit 73 and newly marked Exhibit 130. Have you seen</p>
<p>1 know, what is the point to make more paper? To say well 2 if it's Eber-Connecticut then Eber-Connecticut value is 3 lower, but then it's the same flip side that Eber-Metro 4 has less operating assets. I am not sure I understand. 5 I know it must make such kind of legal difference, but 6 from my perspective, I just don't see what the point 7 would be to do that analysis. 8 Q. We were talking about PBGC. What about the 9 Teamsters liability? What is your basis for believing 10 that is something -- that a reasonable investor would 11 attribute to Eber-Metro? 12 A. Same basis. I think -- I know that there was a 13 lawsuit over payment of the Harris Beach amount. And 14 they sued for fraudulent conveyance. 15 Q. Do you know the timing of those lawsuits? 16 A. That would have been a post-valuation date. 17 Q. Right. 18 A. But my point is that from an investor's 19 perspective, it's like day follows night. You start 20 playing around with pension obligations whether it's the 21 PBGC insured and pension from Teamsters, you are going to 22 price protect yourself. And I think the same holds true 23 with the other obligations as well. 24 Q. If a liability is contingent upon a creditor 25 successfully pursuing a fraudulent conveyance lawsuit, is</p>	<p>Page 79</p> <p>1 either of these documents before today? 2 A. Let me read it. I think I have seen 3 Exhibit 74 before. It looks familiar. I am not sure I 4 recollect 130. 5 Q. So looking at Exhibit 74 then, you see it is a 6 confession of judgment signed by Wendy Eber on behalf of 7 the Eber Brothers Wine and Liquor Corp. And that's as to 8 the Teamsters liability? 9 A. Right. 10 Q. And that number matches within five cents the 11 number you've got in your summary of liabilities, right? 12 A. Yes. 13 Q. Do you see that this confession of judgment 14 only as to Eber Brothers Wine and Liquor Corp and not 15 Eber-Metro? 16 A. So I think you're referring to the heading in 17 there that says the defendant is Eber Wine and Liquor 18 corporation. 19 Q. Yes. 20 A. Yes. It says Eber Wine and Liquor Corporation. 21 It does not say Eber-Metro. 22 Q. Then looking at 130. That's the exhibit in 23 front of you. Wendy Eber is explaining the reason for 24 that. She says in the last paragraph, "I had modified 25 the confession of judgment to reflect that it is against</p>

<p style="text-align: right;">Page 82</p> <p>1 Eber Brothers Wine and Liquor Corporation and not the 2 Eber companies." Do you see that? 3 A. I see that. 4 Q. So is it your opinion that these documents 5 reflecting that the liability was only against 6 Eber Brothers Wine and Liquor Corp does not change your 7 assessment that that liability belonged to Eber-Metro? 8 MR. RAMSEY: Form, legal opinion. 9 MR. CALIHAN: Objection to form. 10 A. Yeah. You keep saying belonged to. I am 11 saying that an investor is going to take that into 12 account. They are not going to put little compartments 13 and say this is not the obligation of Metro. You know, 14 what this says, it says. It doesn't alter my opinion as 15 to how an investor is going to look at these kind of 16 obligations. 17 Q. And by these kind of obligations, do you mean 18 pension obligations specifically, or any debt belonging 19 to the parent company that is transferring its 20 subsidiary? 21 A. Most certainly it's going to reflect the 22 pension, both the PBGC as well as the Teamsters, but yes. 23 Clearly for a company that -- I say the company -- for 24 the situation where the assets of Metro are such that 25 obligations, even if you consider them up the line, can't</p>	<p style="text-align: right;">Page 84</p> <p>1 Q. Just as if you're doing a valuation based upon 2 what people knew at the time, they wouldn't be based upon 3 what restated numbers were a year later, correct? 4 A. Fair enough. 5 Q. So in this instance, why isn't the 6 determination of what the liabilities of Eber-Metro were 7 something that should be based on what the understanding 8 was at the time of management and the purchaser of what 9 the liabilities of what Eber-Metro would be? 10 MR. RAMSEY: Form. 11 A. Because I am trying to understand how an 12 investor, a willing buyer, is going to view this company. 13 That is my analysis. I mean, I don't know how else to 14 say that. I've said it five times now. And you keep 15 trying to say, "Well, don't you want to value it the way 16 that Wendy valued it?" No. That's not my task here. I 17 mean, she did what she did. She wrote what she wrote. 18 Her view is what it is. I am telling you how I am doing 19 the valuation. 20 Q. And I am just -- I am not trying to be obtuse 21 here. I'm trying to get a clear record. So the 22 reasonable investor in your view would conclude that 23 Eber-Metro would still be on the hook because upon 24 transfer, Eber Wine and Liquor was left with insufficient 25 assets to meet its debt; is that fair to say?</p>
<p style="text-align: right;">Page 83</p> <p>1 be covered, yes. It will. They just -- it just can't be 2 ignored. 3 Q. Because of the likelihood of fraudulent 4 conveyance? 5 A. That is a distinct possibility. Like I said, I 6 think that any time you have a situation where you're 7 selling assets and you're receiving a price that is less 8 than the liabilities, that is exactly what you're going 9 to encounter and an investor is going to know that. 10 Q. So focusing on Harris Beach, that's not a 11 pension obligation. Does it change your conclusions in 12 any way that at the time of the Alexbay transfer in 2012 13 the only party being sued by Harris Beach and that owed 14 money to Harris Beach according to its engagement 15 agreement was Eber Brothers Wine and Liquor? 16 MR. RAMSEY: Form. I will make the same 17 objection. I think you're looking for a legal 18 conclusion here. 19 A. Yeah. I mean -- look, I know that they did sue 20 all the entities at some point for payment. 21 Q. I do want to be clear. I am not looking for a 22 legal conclusion because your valuation is not based upon 23 what the actual law was, right? What the actual 24 liabilities were as determined by later courts, correct? 25 A. Fair enough.</p>	<p style="text-align: right;">Page 85</p> <p>1 A. You're talking about all the items? 2 Q. Yes. 3 A. So number one, there is the legal determination 4 that I said before. 5 Q. Right. 6 A. That I have been given. Number two, it makes 7 absolutely sense to me from an economic perspective. 8 That any investor is going to price protect themselves, 9 particularly for a company that's in financial distress. 10 And that I think there is no dispute. Certainly without 11 question even Eber-Metro is in financial distress. And 12 when you are a company in financial distress and you've 13 got liabilities attached to those assets, boy, oh boy, 14 you know, you just can't ignore that. And that's my 15 opinion. That investor would not ignore that. And would 16 not put it in compartments notwithstanding what Wendy 17 thinks. It's interesting, but it doesn't affect my 18 opinion. 19 Q. Okay. Let's take that break. 20 (Whereupon, there is a short recess in the 21 proceedings.) 22 Q. Okay. So going to your report in general, you 23 did five valuation analyses for Eber-Connecticut; is that 24 correct? 25 A. Yes.</p>

<p style="text-align: right;">Page 86</p> <p>1 Q. But you did not offer an opinion on which of 2 those valuation is most reliable or some combination of 3 them to arrive at a final number, did you?</p> <p>4 A. No. I provided a range of values from each of 5 those five. The range of values results from each of 6 those five measurements.</p> <p>7 Q. Why didn't you offer an opinion on what the 8 correct value should have been?</p> <p>9 A. Well, in my view, the range that I developed 10 and applied told me that this was an insolvent company.</p> <p>11 Q. Not Eber-Connecticut though?</p> <p>12 A. No. Up the chain, yes.</p> <p>13 Q. Right. But as we have been suggesting, there 14 are potential questions as to whether or not the numbers 15 for the debt are correct or legally relevant or something 16 like that.</p> <p>17 MR. RAMSEY: Form.</p> <p>18 Q. So in that instance, wouldn't it be important 19 about to what the value of Eber-Connecticut is if the 20 value would determine whether or not it was solvent -- 21 the parent companies were solvent?</p> <p>22 A. You mean a point estimate?</p> <p>23 Q. Yes.</p> <p>24 A. Well, if you want a point estimate. Just take 25 the midpoint, that's fine.</p>	<p style="text-align: right;">Page 88</p> <p>1 transaction. That has a significant problem because of 2 the substantial rights. I've got two pages in my report 3 talking about the substantial rights. Now, I try to do a 4 conservative estimate as to what those rights are to come 5 up with some value. But, look, for a company in 6 financial distress in particular, the preferred stock 7 aspect of it is going to be huge -- absolutely huge. So 8 is that a problem? Yeah. I mean you try to adjust away 9 from it. That is a problem. You know, that is one of 10 those things that make that valuation uncertain. 11 Southern offer to a lesser extent -- the Southern offer 12 also has this right of first refusal that causes one to 13 do again an adjusted valuation of the Southern offer.</p> <p>14 Q. And the Southern offer wasn't actually 15 accepted?</p> <p>16 A. Look, you know, the Southern offer wasn't 17 accepted, but I view that as a bona fide offer. And a 18 bona fide offer is a reasonable thing to use in the 19 analysis. So I wouldn't -- I am not going to discount it 20 because it wasn't an actual transaction. I think it's 21 still relevant.</p> <p>22 Q. Can you please explain what you mean by bona 23 fide offer?</p> <p>24 A. Well, there were something -- I think it was 25 like 14 amendments. It was far along. There was a lot</p>
<p style="text-align: right;">Page 87</p> <p>1 Q. Why is that appropriate?</p> <p>2 A. There are five measures of value. Each of them 3 has problems. But these are the kinds of things -- not 4 with understanding problems -- these are the kind of 5 thing that investors are going to look at in formulating 6 their opinion. If you're so inclined to only want to 7 point an estimate, I mean, you know, in my view a 8 reasonable range is more informative. I think it 9 provides more information.</p> <p>10 Q. Do you think --</p> <p>11 MR. RAMSEY: Go ahead, finish your answer.</p> <p>12 A. I think a reasonable range provides more 13 information. It is un essence the sensitivity analysis 14 or effective sensitivity analysis of what you were 15 referring to earlier about well, is there uncertainty 16 with numbers. Well, the more numbers you have, the more 17 certain you are about what ultimately that range of value 18 is.</p> <p>19 Q. Do you consider all five methods to be equally 20 reliable?</p> <p>21 A. You know, so first I would say that these 22 measurements are things that an investor would look at. 23 Each of these methods has problems perhaps multiple 24 problems. I think if you start with the offers or the 25 transactions. So start with the Eder-Goodman</p>	<p style="text-align: right;">Page 89</p> <p>1 of paperwork involved -- due diligence.</p> <p>2 Q. I mean in general what a bona fide offer is?</p> <p>3 Like how does something constitute that?</p> <p>4 MR. RAMSEY: Form.</p> <p>5 A. I draw a distinction between, you know, saying 6 I have, you know, a preliminary offer of interest. That 7 I wouldn't consider a bona fide offer. But if you've got 8 a substantial amount of paperwork behind an offer with a 9 lot of conditions and things that have been formulated, 10 that to me is a bona fide offer. That's what I view 11 anyway.</p> <p>12 Q. Is a --</p> <p>13 A. You want me to finish my answer? I was not 14 done. So we can go back to any one you want to. So with 15 regard to the Pole-Bridge Bowman offer, that to me has 16 problems too. It's a transaction that I am not 100 17 percent comfortable with that being the measure of value. 18 I don't know that I would -- I think that has problems as 19 well.</p> <p>20 Q. Why aren't you comfortable with it?</p> <p>21 A. Well, I am concerned that it could possibly not 22 be an arm-lengths transaction. I can't make a 23 determination one way or the other, but it causes me 24 concern.</p> <p>25 Q. Why -- just to follow up on that, what about it</p>

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<p>1 does not appear to be arm's-length?</p> <p>2 MR. RAMSEY: Form.</p> <p>3 A. I was concerned that the company was</p> <p>4 repurchased at the same price. It could be -- there</p> <p>5 could be explanations why that occurred, but the fact of</p> <p>6 that doesn't sound right to me.</p> <p>7 Q. I am sorry. What do you mean by that?</p> <p>8 A. It was unwound.</p> <p>9 Q. Okay. The terms of the exercising how Wendy</p> <p>10 Eber ended up acquiring it?</p> <p>11 A. Yes. I didn't see anything contemporaneous to</p> <p>12 the transaction itself that could indicate this. The</p> <p>13 ultimate unwinding caused me a little bit of questioning</p> <p>14 whether the transaction was a pristine transaction. And</p> <p>15 also problem -- the other problem I had with that is that</p> <p>16 there was a right of first refusal in that offer. So you</p> <p>17 have to adjust that. Now with regard to the farmers --</p> <p>18 Q. I just want to stay on that one for a second,</p> <p>19 then we will jump to the other just so the transcript</p> <p>20 is -- in forming your opinion, were you aware of who were</p> <p>21 the owners of Pole-Bridge Bowman and Partners?</p> <p>22 A. I know that it was a gentleman named Steurm was</p> <p>23 the principal.</p> <p>24 Q. And what is your understanding of what his</p> <p>25 relationship was to the Ebers?</p>	<p>1 that the transaction would not be arm's-length.</p> <p>2 Q. I am asking if the fact that there is a</p> <p>3 fiduciary relationship between two individuals prevents</p> <p>4 that transaction for being characterized as an</p> <p>5 arm's-length transaction?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 A. I would think it would be just the opposite. I</p> <p>8 think the fiduciary would have an obligation to make sure</p> <p>9 that whatever transaction took place was a fair market</p> <p>10 value unless I am missing something. You seem to have a</p> <p>11 different --</p> <p>12 MR. RAMSEY: I think we're in the legal</p> <p>13 realm here.</p> <p>14 Q. So the term arm-length, is that fair to say</p> <p>15 that is a term that is important to your valuation work?</p> <p>16 A. Well, it is a shortcut to Page 1 of my report</p> <p>17 that talks about a willing buying and willing seller with</p> <p>18 knowledge of all relevant facts and no compulsion to buy</p> <p>19 or compulsion to sell. And so those are the things that</p> <p>20 in my view constitute an arm's-length transaction.</p> <p>21 Q. So let me pose to you the hypothetical. If the</p> <p>22 transaction was entered into between a lawyer and his</p> <p>23 client to acquire an equity interest in a company and the</p> <p>24 lawyer did not actually want to buy that interest, but it</p> <p>25 was done for structural purposes to benefit the</p>
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<p>1 A. He was the consultant. My understanding he was</p> <p>2 a consultant. Maybe the term is workout consultant for</p> <p>3 companies in financial distress to get to them to work</p> <p>4 out of their distress. And I think he was a lawyer.</p> <p>5 Q. And are you aware that the Ebers have said that</p> <p>6 he was their lawyer?</p> <p>7 MR. RAMSEY: Form.</p> <p>8 A. I know he was their consultant. I don't know</p> <p>9 that he gave legal opinions.</p> <p>10 Q. Would it affect your assessment of whether this</p> <p>11 was an arm-length transaction if you found out that Glenn</p> <p>12 Steurm had an attorney/client relationship with the Ebers</p> <p>13 individually or with one of their companies?</p> <p>14 A. No, I don't think so. I am not sure why that</p> <p>15 would affect my view of things whether he is providing</p> <p>16 consulting services or legal services. I am not sure</p> <p>17 that matters.</p> <p>18 Q. Is a fiduciary relationship an arm-length</p> <p>19 relationship in your opinion?</p> <p>20 MR. RAMSEY: Form.</p> <p>21 A. Is a fiduciary relationship an arm's-length</p> <p>22 relationship? I am not sure what you mean by that.</p> <p>23 Q. Do you understand the term fiduciary</p> <p>24 relationship?</p> <p>25 A. The transaction -- because he is a fiduciary</p>	<p>1 client, would you consider that to be an arm's-length</p> <p>2 transaction?</p> <p>3 MR. RAMSEY: Form.</p> <p>4 A. Structural purposes to -- that's way beyond --</p> <p>5 I mean I don't know how to answer that question.</p> <p>6 Structural purposes to benefit --</p> <p>7 Q. One simple thing. I will rephrase. If a</p> <p>8 person -- you refer to as a will buyer?</p> <p>9 A. Yes.</p> <p>10 Q. What did the buyer actually did not have any</p> <p>11 economic interest in acquiring the equity and he did it</p> <p>12 solely to fulfill his legal obligation to a client.</p> <p>13 MR. RAMSEY: Form.</p> <p>14 Q. Could you rely on that transaction to determine</p> <p>15 the value of the equity?</p> <p>16 A. You're saying a fiduciary would have a legal</p> <p>17 obligation.</p> <p>18 Q. I am not saying necessarily as a fiduciary. I</p> <p>19 am talking about a particular circumstance where a lawyer</p> <p>20 decides -- a lawyer specifically says, "I do not want to</p> <p>21 buy this, but I will do so if I have to. So that the</p> <p>22 sale can go through."</p> <p>23 MR. RAMSEY: Form.</p> <p>24 Q. Is that just impossible to believe?</p> <p>25 A. It's a little hard to believe.</p>

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<p>1 Q. I will show you a document.</p> <p>2 A. Okay.</p> <p>3 Q. All right. I will read for you a memo from</p> <p>4 Glenn Steurm, the owner of Pole-Bridge Bowman.</p> <p>5 A. Uh-huh.</p> <p>6 Q. To Pat Dalton, a lawyer for Wendy and Lester</p> <p>7 Eber and copying Wendy and Lester Eber dated May 26,</p> <p>8 2010. That is I think two days before -- two to four days</p> <p>9 before the effective date of the Pole-Bridge Bowman</p> <p>10 transaction?</p> <p>11 A. Okay.</p> <p>12 Q. This memo states, "The current proposal is for</p> <p>13 a single-member LLC New-co to acquire the interest and</p> <p>14 that I be the only equity holder of the new LLC. Here</p> <p>15 are the terms that we discussed. One, New-co purchases a</p> <p>16 six percent equity interest in Connecticut for a secured</p> <p>17 non-recourse note in the amount of blank dollars. Wendy</p> <p>18 Eber has an exclusive right of first refusal to purchase</p> <p>19 the entire equity interest from New-co. If Ms. Eber</p> <p>20 does not exercise her right, then Metro has the next</p> <p>21 right of first refusal to purchase the entire equity</p> <p>22 interest. If Metro does not exercise its right, then</p> <p>23 Eder-Goodman has the final right of first refusal to</p> <p>24 purchase the stock. If neither Ms. Eber, Metro or</p> <p>25 Eder-Goodman elects their right, then New-co will be</p>	<p>1 identify at an alternative purchaser of the six percent</p> <p>2 interest in the Connecticut, LLC.</p> <p>3 MR. RAMSEY: And what is the question.</p> <p>4 Q. So the question is, based on the fact that</p> <p>5 Glenn Steurm is saying Wendy and Lester Eber and their</p> <p>6 lawyer -- that he does not want to actually buy the six</p> <p>7 percent, does that sound like an arm's-length transaction</p> <p>8 to you?</p> <p>9 MR. RAMSEY: Form. I am not sure that's an</p> <p>10 accurate interpretation.</p> <p>11 A. I am -- you're asking me to interpret this</p> <p>12 letter to mean that he does not want to buy this?</p> <p>13 Q. I am asking you if someone were to conclude --</p> <p>14 so this is a hypothetical now. If someone were to</p> <p>15 conclude that Glenn Steurm did not actually have an</p> <p>16 economic interest in purchasing the six percent equity</p> <p>17 that was sold to Pole-Bridge Bowman and Partners, would</p> <p>18 that affect your opinion of whether that was an</p> <p>19 arm's-length transaction?</p> <p>20 A. It could. If there is no economic interest --</p> <p>21 MR. RAMSEY: You've answered it. It could.</p> <p>22 A. It could.</p> <p>23 Q. Have you ever heard of a round-trip</p> <p>24 transaction?</p> <p>25 A. Well, I know a round-trip transaction with</p>
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<p>1 required to retain its interest. The Ms. Eber will have</p> <p>2 a proxy to vote the equity interest held by New-co and a</p> <p>3 limited Power of Attorney. I have no pride of authorship</p> <p>4 in this outline. If we can find a different structure</p> <p>5 that works that would be better for me. Based on that</p> <p>6 memo, does that sound like a transaction that was</p> <p>7 negotiated at arm's-length?</p> <p>8 MR. RAMSEY: Form.</p> <p>9 A. I am trying to understand. How these items</p> <p>10 that you listed to me indicated that it's not arm-length.</p> <p>11 Q. Those items actually aren't. I was mostly</p> <p>12 doing that because you don't have the document in front</p> <p>13 of you and I want to be fully transparent and read</p> <p>14 everything. I think the point I want to focus on is that</p> <p>15 you said -- I actually left out the first line. That's</p> <p>16 really important. Pat, as we discussed this morning, we</p> <p>17 need to identify an alternative purchaser of the six</p> <p>18 percent interest the Connecticut, LLC. The current</p> <p>19 proposal is for a single-member LLC. New-co to acquire</p> <p>20 the interest and that I be the only equity holder of the</p> <p>21 LLC. And then at the end he says if we can find a</p> <p>22 different structure that works that would be better for</p> <p>23 me.</p> <p>24 A. So read that first sentence again?</p> <p>25 Q. As we discussed this morning, we need to</p>	<p>1 regard to a security. You buy and then you sell it.</p> <p>2 Q. Are you familiar with a round-trip transaction</p> <p>3 in which it creates an appearance of economic substance,</p> <p>4 but in fact because money is going both ways there is no</p> <p>5 real economic substance to it?</p> <p>6 A. Yes. I've actually offered opinions on this</p> <p>7 for the Department of Justice.</p> <p>8 Q. And in the case of the Pole-Bridge Bowman</p> <p>9 transaction, it was funded by the note for the same</p> <p>10 purchase price. Do you see any similarities between that</p> <p>11 and a round-trip transaction?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 A. I mean note in lieu of cash. I mean it's a</p> <p>14 still an asset on the balance sheet for the company. So</p> <p>15 I am not sure what you mean. That only cash counts?</p> <p>16 Q. No. I am just saying if someone supposedly</p> <p>17 purchases equity in a company, but they receive the money</p> <p>18 to do that from the company itself such as a company</p> <p>19 receives no cash.</p> <p>20 MR. RAMSEY: Form.</p> <p>21 Q. Does that affect?</p> <p>22 A. If the asset has value whether it's cash or</p> <p>23 not, it shouldn't matter.</p> <p>24 Q. Well, okay.</p> <p>25 A. If the buyer is providing a note saying, "I owe</p>

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<p style="text-align: right;">Page 98</p> <p>1 you this money." There is a note. That's my obligation 2 to you in lieu of giving cash. You seem to be drawing a 3 distinction between the value of a note and the value of 4 cash. Is that what you're saying?</p> <p>5 Q. I am not necessarily drawing a distinction 6 there. What I am saying is, you know, let's step back 7 for a minute. For what reasons does a company -- a 8 privately held company generally sell equity in a company 9 that it holds?</p> <p>10 A. You mean like a secondary offering?</p> <p>11 Q. A secondary offering or where like in this case 12 where Eber-Metro sold some of the interest it held in 13 Eber-Connecticut?</p> <p>14 A. Well, for a secondary offering they generally 15 are trying to sell new shares to investors too, you know, 16 for a variety of reasons. But, for example, make a 17 capital investment of some kind. Selling shares, selling 18 existing shares held by some other entity. You know, 19 selling existing shares doesn't raise any new capital per 20 se. Other than that, I don't know how to answer your 21 question as a general matter.</p> <p>22 Q. Did you review the critique of this 23 transactions economic substance from Glenn Liebman?</p> <p>24 A. Yes. My recollection is that he also had 25 issues with regard to whether this was arm's-length.</p>	<p style="text-align: right;">Page 100</p> <p>1 note?</p> <p>2 A. Right.</p> <p>3 Q. At the end of the day the only thing it can 4 really get for that is just the shares back that is 5 initially transferred if it were to foreclose on, right?</p> <p>6 A. Where does it say that?</p> <p>7 Q. It's a nonrecourse note, right?</p> <p>8 A. They couldn't pay it.</p> <p>9 Q. Would it matter whether Pole-Bridge Bowman had 10 any other assets to you?</p> <p>11 A. No. I am just questioning your -- you draw a 12 conclusion that the only way -- you said that the only 13 way is to get the shares back. And I never saw that 14 written anywhere.</p> <p>15 Q. I realize that. And that's where I was jumping 16 ahead. I may have left out some facts from here. Do you 17 know anything about Pole-Bridge Bowman and what kind of 18 investments or businesses it was involved in?</p> <p>19 A. I know it was an LLC. I know that Steurm was 20 the principal of that LLC. Beyond that, I don't.</p> <p>21 Q. Would it affect your assessment of whether this 22 was an arm's-length deal to find out that Pole-Bridge 23 Bowman was an entity that was created with no other 24 assets solely for purposes of engaging in this 25 transaction?</p>
<p style="text-align: right;">Page 99</p> <p>1 Q. Right. And one of the things he pointed out 2 was the interest rate on the note was only two percent 3 when the company was at the time borrowing money from 4 Lester Eber at 12.5 percent. Does that make sense to 5 you?</p> <p>6 MR. RAMSEY: Form.</p> <p>7 A. You know, I have a hard time with that. When 8 the company borrows money, it's paying. And it's the 9 company credit that dictates the interest rate. So if a 10 company is in financial distress and it wants to borrow 11 money, it's likely that it's going to pay a high interest 12 rate. Now, in this case, this is an asset that is being 13 provided to the company. A company is not borrowing 14 this. Unless I am missing something.</p> <p>15 Q. Isn't the company loaning money?</p> <p>16 A. Huh?</p> <p>17 Q. The company is loaning money, is it not?</p> <p>18 A. How? If it's an asset on the company's 19 books -- it's giving shares to the LLC and the LLC is 20 getting a note.</p> <p>21 Q. Right. So it's giving up shares that were in a 22 company a going concern, right? So that comes off the 23 balance sheet?</p> <p>24 A. Yes.</p> <p>25 Q. And on the balance, it gets this nonrecourse</p>	<p style="text-align: right;">Page 101</p> <p>1 MR. RAMSEY: Form.</p> <p>2 A. No. I don't think so.</p> <p>3 Q. So if an entity has no other assets and it's a 4 nonrecourse note, if the note isn't repaid, then isn't it 5 true that the company's only recourse is to require the 6 shares that it initially distributed?</p> <p>7 A. Well, I mean, imagine that if one state of the 8 world is where the value of the shares go up -- would the 9 LLC just say, "Oh. Okay. Here is your shares back." 10 Why wouldn't they just pay off the note and keep the 11 shares? That makes economic sense to me. And you're 12 dismissing that as a possibility.</p> <p>13 Q. Well, isn't that what actually happened? The 14 value of the company definitely went up once it became 15 profitable, right?</p> <p>16 A. It became profitable, but I can't say I am 17 hypothesizing -- look, you said the only possible outcome 18 is if they give the shares back. And I'm saying that 19 doesn't make sense to me. I can imagine -- I am not 20 saying it happened. But I can imagine the state of the 21 world where it is in the economic interest to Steurm to 22 say, "Hey, the values of these shares is increased 10 23 times what it was in 2010. Hell. Here is the money for 24 the note. We will close this off. I will take the 25 shares." Why not?</p>

<p style="text-align: right;">Page 102</p> <p>1 Q. Would it affect your assessment with whether 2 the Pole-Bridge Bowman transaction was arm's-length if 3 you were to learn that it was engaged in part to 4 compensate Glenn Steurm for his services?</p> <p>5 A. Well, I don't think that would be a sufficient, 6 you know, indication to eliminate that as an indication 7 of value.</p> <p>8 Q. Would it require an adjustment at least?</p> <p>9 MR. RAMSEY: Form.</p> <p>10 A. Look, you know, you want to have an assessment 11 as to whether it was a deal at fair market value. That's 12 ultimately what you're talking about. Do stock 13 transactions occur for parties that are consultants to 14 particularly small firms? Yes. Does it mean that they 15 are necessarily not an arm's-length transaction? Well, 16 no. In fact, I can imagine, you know, that you would want 17 to strike a deal at fair market value. So I don't know 18 that I can agree that it's a de facto collusion that 19 someone is being -- instead of providing cash, they are 20 given stock in a company. I don't know that is 21 necessarily a non-arm's-length transaction or to put 22 differently that transaction took place at something 23 other than fair market value based solely on that.</p> <p>24 Q. Isn't it a reason to question the fair market 25 value more though?</p>	<p style="text-align: right;">Page 104</p> <p>1 MR. RAMSEY: Form.</p> <p>2 A. Well, I think the question is whether the trier 3 of fact would conclude that it's outside of it. Not so 4 much a valuation expert. If a trier of fact concludes 5 that it's not arm's-length transaction, could well be I 6 am not going to consider this transaction. From my 7 perspective, I guess I kind of take in a little different 8 view of this. Like I said, the ultimate determination is 9 whether it's a fair market value. And one of the things 10 that is kind of interesting is whether or not the 11 valuation is within the range of other evaluations. 12 That's kind of interesting to me. That may not convince 13 a trier of fact. The trier of fact says, "No. It's not 14 arm's-length. I am not going to think about that." 15 Okay. So be it. Cross it off your list. But for me -- 16 and I think for an investor it is a data point of 17 interest.</p> <p>18 Q. For an investor, do you believe that would be 19 appropriate to rely solely on the Pole-Bridge Bowman 20 transaction as a basis for value?</p> <p>21 A. If it was determined to be non-arm's-length?</p> <p>22 Q. Either way. Just based on the facts that you 23 know about the transaction where you question it, do you 24 believe that it would be appropriate for an investor to 25 base valuations solely on that transaction and not</p>
<p style="text-align: right;">Page 103</p> <p>1 A. Well, it's certainly one of those indications 2 that you are concerned about it. And that's what I said 3 a minute ago, I am concerned. I think it is a 4 transaction that an investor is going to look at. But 5 with full knowledge at least of the information that I 6 had, yes. I would say that there are problems with it. 7 Just like there is problems with all these transactions. 8 I mean everything has an issue. There is no question 9 about that. So that's the best way I can answer your 10 question. It's a concern. It's a problem, but all these 11 metrics have problems. And that's why the range is 12 important to get a sense as to whether there is some kind 13 of assessment of valuation range each year that allows 14 you to draw a conclusion.</p> <p>15 Q. Just so I am clear, and correct me if I am 16 wrong. In your opinion, the fact that the Pole-Bridge 17 Bowman transaction was in part compensation to Glenn 18 Steurm would not necessarily affect any of your 19 calculations in terms of what the valuation would be 20 based on the Pole-Bridge transaction?</p> <p>21 A. No. Not in and of itself it would not.</p> <p>22 Q. But just on the broader point, if a fact-finder 23 were to conclude that a transaction was not conducted at 24 arm's-length, would that mean in your view the 25 transaction should be excluded from a valuation analysis?</p>	<p style="text-align: right;">Page 105</p> <p>1 consider any other valuation method?</p> <p>2 MR. RAMSEY: Form. Go ahead.</p> <p>3 A. The way I can answer that question is I don't 4 know that I would look at any of these five alone and say 5 that's the only thing you should look at or if that was 6 the only thing available. Is it a precise, accurate 7 measure of value? The only one that I really like that I 8 think has the least amount of problems is the Prospect 9 Beverage. That one -- I mean the problem with that is 10 that it's 10 years old at that time of transaction. But, 11 you know, look at the other dates. I mean the 12 Eder-Goodman is four years old -- five years old.</p> <p>13 Q. You're missing -- -</p> <p>14 A. Six years old. Like I said before, so each of 15 these has problems. You've got all of these right issues 16 in many of these transactions. The Prospect, is in my 17 view, one of the tightest comparable transactions that I 18 have encountered in doing valuations.</p> <p>19 Q. Is it a coincidence that is the transaction 20 that results in by far the lowest value for 21 Eber-Connecticut?</p> <p>22 MR. RAMSEY: Form.</p> <p>23 A. It is a coincidence. It turns out that way.</p> <p>24 But maybe that is not a coincidence. Maybe that really 25 reflects what the value of what Eber-Connecticut was.</p>

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